

N. 2893

No. 14392

United States
Court of Appeals
for the Ninth Circuit

CATHERINE O'CONNOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB 15 1955


PAUL P. O'BRIEN,
CLERK

United States
Court of Appeals
for the Ninth Circuit

CATHERINE O'CONNOR, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—1-20-55



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | PAGE |
|--|------|
| Amendment to Answer to Petition for Redetermination | 18 |
| Answer to Petition for Redetermination..... | 10 |
| Certificate of Clerk to Transcript of Record... | 59 |
| Decision | 54 |
| Findings of Fact, Conclusions of Law and Opinion | 23 |
| Motion for Rehearing, for Reconsideration and for Certain Findings | 55 |
| Names and Addresses of Attorneys..... | 1 |
| Opinion | 39 |
| Order Denying Motion for Rehearing..... | 57 |
| Order Granting Motion re Exhibits (USCA).. | 400 |
| Petition for Redetermination of Deficiency... | 3 |
| Petition for Review | 57 |
| Replication to Amendment to Answer..... | 20 |
| Replication to Answer to Petition for Determination | 15 |
| Statement of Points on Which Petitioner Intends to Rely (USCA)..... | 398 |

ii.

| | |
|--|----|
| Transcript of Proceedings and Testimony..... | 60 |
|--|----|

| | |
|---|---------|
| Exhibit 8-A—(Joint)—Transcript of Testimony in Case No. 30,929-R (Excerpts) | 355-387 |
| Admitted in Evidence | 87 |

Witnesses:

| | |
|---------------------|-----|
| Beall, Mrs. Alberto | |
| —direct | 359 |
| —cross | 362 |

| | |
|---------------------|-----|
| Mattick, Rose Marie | |
| —direct | 365 |
| —cross | 368 |
| —redirect | 370 |
| —recross | 372 |

| | |
|---------------------|-----|
| O'Connor, Catherine | |
| —direct | 373 |

| | |
|-------------------------|-----|
| Tormey, Paul J. | |
| —cross | 355 |
| —recross | 358 |
| —rebuttal, direct | 379 |
| —cross | 382 |
| —redirect | 386 |

Exhibits for Petitioner:

| | |
|---|-----|
| 1—Letter, April 4, 1950, Howard B. Crittenden, Jr., to Technical Staff, Bureau of Internal Revenue | 387 |
| 2—(For Identification — Admitted as Respondent's Ex. N)—Letter, April 10, 1950, B. H. Neblett, Division Counsel, to Howard B. Crittenden, Jr..... | 391 |

Transcript of Proceedings—(Continued)

Exhibits for Petitioner—(Continued)

| | |
|---|-----|
| 3—Letter, April 11, 1950, Howard B. Crittenden, Jr., to Technical Staff, Bureau of Internal Revenue | 393 |
|---|-----|

Opening Statements:

| | |
|---|----|
| By Mr. Crittenden on behalf of Petitioner | 64 |
| By Mr. Marcussen on behalf of Respondent | 65 |

Witnesses:

Krause, Clarence L.

| | |
|---------------|-----|
| —direct | 243 |
| —cross | 335 |

O'Connor, Catherine

| | |
|-----------------|----------|
| —direct | 99, 113 |
| —cross | 127 |
| —redirect | 135, 159 |
| —recross | 139, 172 |

Roche, W. M.

| | |
|---------------|-----|
| —direct | 110 |
| —cross | 112 |

Sorrell, Henry

| | |
|---------------------------|-----|
| —direct | 174 |
| —cross | 183 |
| —redirect | 191 |
| —recross | 191 |
| —recalled, redirect | 197 |
| —recross | 198 |

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Tormey, Paul W.

| | |
|-------------------------|----------|
| —direct | 192 |
| —recalled, direct | 199, 246 |
| —cross | 249 |
| —redirect | 310, 333 |
| —recross | 315 |

NAMES AND ADDRESSES OF ATTORNEYS

For the Petitioner:

HOWARD B. CRITTENDEN, JR.,

Central Tower,
San Francisco, California.

For the Respondent:

CHARLES OLIPHANT,

Chief Counsel,

H. BRIAN HOLLAND,

Assistant Attorney General,

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

LEONARD ALLEN MARCUSSEN,

Special Attorneys,
Bureau of Internal Revenue.

The Tax Court of the United States

No. 24206

CATHERINE O'CONNOR, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Now comes your Petitioner Catherine O'Connor
and by her Petition shows:

I.

That the Commissioner of Internal Revenue, respondent above-named, sent a registered letter to your petitioner, Catherine O'Connor, on May 13, 1949 determining and assessing her income tax liability deficiency of \$33,148.16 for the taxable years ending December 31, 1942, 1943 and 1944. That attached thereto was a Treasury Department Form 1276 stating in substance that your petitioner could initiate a proceedings before the Tax Court of the United States within 90 days thereafter.

II.

That the said determination and assessment of income tax liability and determination of deficiency in said registered letter was the said \$33,148.16 sum for the said taxable years of 1942, 1943 and 1944. That your petitioner duly and timely filed her income tax returns for each of said years 1942,

1943 and 1944 on or before the 15th day of March following the close of each taxable year aforesaid, with the Collector of Internal Revenue of the First District of California at San Francisco, California.

III.

That a copy of the said Commissioner's registered letter of May 13, 1949 together with the statement attached thereto is set forth *hoc verba* in Exhibit A of this petition, and is incorporated herein, made a part hereof to the same extent, to the same effect, and as if herein set forth at length.

IV.

That said respondent Commissioner erred in the said determination of said deficiency, in the following:

1. That the assessment for the taxable year 1942 was not timely and barred by reason of Internal Revenue Code Sec. 275 (a), more than 3 years having elapsed from 15 March 1943 to 13 May 1949.
2. That the assessment for the taxable year 1942 was not timely and barred by reason of Internal Revenue Code Sec. 275 (c), more than 5 years having elapsed from 15 March 1943 to 13 May 1949.
3. That the assessment for the taxable year 1943 was not timely and barred by reason of Internal Revenue Code Sec. 275 (a), more than 3 years having elapsed from 15 March 1944 to 13 May 1949.

4. That the assessment for the taxable year 1943 was not timely and barred by reason of Internal Revenue Code Sec. 275, (c), more than 5 years having elapsed from 15 March 1944 to 13 May 1949.

5. That the assessment for the taxable year 1944 was not timely and barred by reason of Internal Revenue Code Sec. 275, (a), more than 3 years having elapsed from 15 March 1945 to 13 May 1949.

6. That there is no factual basis for any assessment or penalty under Internal Revenue Code Sec. 293B for any of said taxable years, and there was no fraud or intent to evade any tax, in any sum, or at all in any of said years, or any other time.

7. That the attached statement for the year 1942 is erroneous in determining \$6320.77 or any other sum in excess of \$172.13 as Business net income.

8. That the attached statement for the year 1942 is erroneous in determining \$303.00 or any other sum as rental income.

9. That the attached statement for the year 1942 is erroneous in determining \$22.44 or any other sum as addition interest income.

10. That the said assessment is erroneous in that it does not give your petitioner credit for losses in the Divers-Jost partnership from theft of money and merchandise of the partnership.

11. That the computations of tax for the year 1942 computes income of her husband William Jost in the first three months of 1942, before the mar-

riage of Jost to petitioner, as income of your petitioner for the purpose of income tax assessment.

12. That the computation of tax for the year 1942 computes income of the husband, community property income taxable to said husband, to your petitioner's income for purpose of tax against her.

13. That any tax for personal income for the taxable year 1942 was forgiven by the Current Tax Payment Act of 1943.

14. That the attached statement for the year 1943 is erroneous in determining there was unreported income in the sum of \$17,030.71 or any other sum, or the net income was increased "per audit of record" in sum of \$791.28 or any other sum, or that there was Rental Income in the sum of \$324.66, or any other sum, or interest omitted in the sum of \$20.67 or any other sum.

15. That the computation for the year 1943 is erroneous in that it purports to omit the community property law of California and charge all community property to one spouse, your petitioner.

16. That the computation of the tax is erroneous in that it assumes that the husband of petitioner, William Jost, did not report and pay the tax apportioned to him.

17. That the computation of the tax is erroneous in that it assumes that the status of husband and wife did not exist between the parties, your petitioner and William Jost during the entire period of the calendar year 1943.

18. That the statement of 1943 tax does not give

your petitioner credit for Other Income (including rental) as a loss of \$28.60.

19. That the statement of 1943 tax does not give your petitioner credit for deductions of \$410.00.

20. That the statement of 1944 attached to said letter as a basis for said assessment is erroneous in determining there was unreported net income of \$22,596.49, or any other sum, or that there was income from rent understated in the sum of \$519.00 or any other sum, or that there was any overstatement of repairs in the sum of \$218.03 or any other sum, or any increase of $\frac{1}{5}$ or any other fraction of \$510.23 or any other sum for repairs, etc., or any decrease in costs of \$3,936.32 or any other sum, or any decrease in contributions of \$481.00 or any other sum.

21. That the Commissioner did not set forth any Schedules A, B or C on page 3 of said attached computations, and for want of the matter therein cannot do other than deny each and every matter adverse to your petitioner, and specify any such claimed adjustment or disallowed deduction as erroneous.

22. That the Commissioner did not apply the law of community property to the petitioner for her marriage to Jost and that was dissolved on July, 1944 by a decree of divorce, but charged your petitioner with all income therefrom.

23. That the Commissioner erred in not giving your petitioner credit for the loss of \$1,295.74 for Other Income (rentals).

24. That the Commissioner erred in not depre-

ciating the investment in fixtures and lease, amounting to \$2500.00 in her tavern business, over the unexpired portion of the lease which was terminated by expiration of its term in early 1945, from the time of acquisition of petitioner in July, 1942, from the partnership that held the same.

V.

That there was no fraud or intent to evade any personal income tax in any of said years. That your petitioner was not skilled in income tax accounting nor law and knew she was not skilled and that 1942 was the first accounting period she did not rely upon a partner to take care of the accounting of her business; and in consequence employed a public accountant of 30 years practice and licensed to practice before the Treasury in tax matters to make out her income tax returns. That in each of the years 1942, 1943 and 1944 your petitioner relied in good faith on said accountant, provided him with all information, records, and made a full and complete disclosure of all matters of her financial matters upon which he made inquiry or requested information; that your petitioner relied upon the returns prepared and filed.

VI.

1. That your petitioner did not receive business net income from her tavern business during the calendar year 1942 in excess of the sum of \$172.13.

2. That your petitioner suffered substantial losses from theft during the Divers-Jost partnership, which the Commissioner well knew but did

not credit to nor take into account in the said determination.

3. That your petitioner was married to William Jost in March 1942 who worked with and put his earnings from his salary in 1942 into the business, and took his personal expenses from the business until the separation in July 1943.

4. That the status of husband and wife and the community were not terminated or dissolved until July 1944.

5. That both were domiciled in and residents of California during said period and the law of community property was applicable to all property and earnings as between your petitioner and her husband by that marriage.

6. That Special Agent Krause of the Bureau of Internal Revenue made an audit of and determined for the Commissioner on such audit that "Other Income" including rents amounted to a loss of \$28.60 during the calendar year 1943 and a loss of \$1295.74 during the calendar year 1944.

7. That your petitioner acquired a one half partnership interest in the tavern business for \$1000 and the entire balance of the partnership assets and interest for an additional \$1500 in July 1942. That the assets consisted of principally fixtures and a lease which expired by its terms in early 1945 at which time the fixtures became valueless as did the lease and your petitioner had to buy land and move to another location.

8. That your petitioner's net income is substantially that upon which tax has been duly paid, and

any error or omissions of her accountant in gross income not reported have been and are counter-balanced by approximately the same amounts by errors and omissions of proper deductions and business expenses not reported by her said accountant in the said returns.

Wherefore your petitioner prays:

1. That the Tax Court redetermine the tax for each of the years 1942, 1943 and 1944.

2. That the Tax Court hold that the remedy and time for assessment was not timely in each of the years 1942, 1943 and 1944 and each barred by Sec. 275.

3. That the Tax Court annul any and all assessments of penalty for fraud or under Sec. 293(b) for each of the years 1942, 1943 and/or 1944.

4. And for such other and further, or other or further relief, decrees, judgments and/or orders as shall be just and equitable in the premises.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

Duly Verified.

* * * * *

[Endorsed]: T.C.U.S. Filed July 19, 1949.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of In-

ternal Revenue, and for answer to the petition filed by the above-named petitioner admits, denies and alleges as follows:

I. Admits the allegations contained in paragraph I of the petition, except denies that there was any assessment of tax by reason of the notice of deficiency.

II. Admits the allegations contained in paragraph II of the petition, except that there was any assessment of tax by reason of the notice of deficiency and that petitioner's returns were duly and timely filed.

III. Admits the allegations contained in paragraph III of the petition.

IV. Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (1) to (24), inclusive, of paragraph IV of the petition.

V. Denies the allegations contained in paragraph V of the petition.

VI. (1) and (2) Denies the allegations contained in subparagraphs (1) and (2) of paragraph VI of the petition.

VI. (3), (4), (5) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (3), (4) and (5) of paragraph VI of the petition.

VI. (6) Denies the allegations contained in subparagraph (6) of paragraph VI of the petition.

VI. (7) For lack of knowledge or information sufficient to form a belief, denies the allegations

contained in subparagraph (7) of paragraph VI of the petition.

VI. (8) Denies the allegations contained in subparagraph (8) of paragraph VI of the petition.

VII. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

VIII. Further answering petition herein, respondent alleges as follows:

(a) During each of the taxable years involved herein petitioner operated a bar on Valencia Street, San Francisco, California, and received income from said business and income in the form of rents on property owned by her and in the form of interest and from other sources.

(b) During each of the taxable years involved herein petitioner received taxable net income in excess of the amount of income reported by her on her returns for each of said years. With intent to evade the tax due thereon petitioner willfully and fraudulently understated her net income on each of said returns for each of said years by the aggregate amounts set forth in the following tabulation:

| Year | Taxable Net Income | Victory Tax Net Income | Net Income Reported | Under- statement |
|------|-----------------------|---------------------------|------------------------|---------------------|
| 1942 | \$10,044.26 | \$ | \$ 777.29 | \$ 9,266.97 |
| 1943 | 21,821.05 | | 7,879.28 | 13,941.77 |
| 1943 | | 22,569.55 | 8,289.28 | 14,280.27 |
| 1944 | 30,571.66 | | 5,091.98 | 25,479.68 |

(c) With intent to evade the tax due on her net income for each of the taxable years involved herein, petitioner willfully and fraudulently kept

false and incorrect books of account from which she caused her returns for each of said taxable years to be prepared, and wilfully and fraudulently failed to keep accurate books of account and records as required by law showing the true amount of the income received by her and the true amount and character of deductions allowable from said income under the Internal Revenue Code.

(d) With intent to evade the tax due on her net income for the taxable year 1942, petitioner willfully and fraudulently understated on her return for said year business income received from the operation of her bar in the amount of \$8,887.03, and willfully and fraudulently failed to report on said return rental income received by her during said year in the amount of \$303.00 and interest income in the amount of \$22.44.

(e) With intent to evade the tax due on her net income for the taxable year 1943, petitioner willfully and fraudulently understated on her return for said year business income received from the operation of her bar in the amount of \$17,821.99, and willfully and fraudulently failed to report on said return rental income received by her during said year in the amount of \$324.66 and interest income in the amount of \$20.67.

(f) With intent to evade the tax due on her net income for the taxable year 1944, petitioner willfully and fraudulently understated on her return for said year the business income received from the operation of her bar in the amount of \$22,-

596.49; willfully and fraudulently overstated in the computation of her income from said business the cost of goods sold in the amount of \$3,936.32 and her expense for repairs in the amount of \$218.03; willfully and fraudulently understated her rental income in the amount of \$519.00; willfully and fraudulently overstated in the total amount of \$510.23 her expense for depreciation, for repairs and for other items in computing the net rental income which she did report on her return for said year; and willfully and fraudulently failed to report interest income received by her during said year in the amount of \$39.13.

Wherefore, it is prayed that petitioner's appeal be denied; that the Court redetermine the taxes and penalties due from this petitioner for the years 1942 through 1944 in the amounts determined by the Commissioner in the notice of deficiency.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal
Revenue

Of Counsel: B. H. Neblett, Division Counsel; T. M. Mather, Leonard Allen Marcussen, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed August 30, 1949.

[Title of Tax Court and Cause.]

REPLICATION

Now comes the Petitioner Catherine O'Connor and answering the allegations of the Respondent in the Answer filed in the above-entitled matter, avers:

1. Admits that from and after July 1942 she, and her husband William Jost, had income from a bar business on Valencia Street in San Francisco, and she had gross income from rentals of certain real property, but denies each and every, all and singular the allegations contained in paragraph VIII of said Answer not so admitted.

And For a Second and Separate Answer, Petitioner avers:

1. Answering Paragraph VIII (b) of said Answer:

Denies any willful or fraudulent understatement in any of said years. Denies taxable income of 1942 was \$10,044.26 or any other sum in excess of approximately \$777.29; denies any understatement in 1942 of \$9,266.97 or any other sum. Denies taxable income of 1943 was \$21,821.05 or any other sum in excess of approximately \$7,879.28; denies any understatement of \$13,941.77 or any other sum. Denies taxable income of 1944 was \$30,571.66 or any sum in excess of approximately \$5,091.98; denies any understatement of \$25,479.68 or any other sum. Denies the 1943 Victory Tax Net Income was \$22,569.55 or any sum in excess of approximately

\$8,289.28; denies any understatement in the sum of \$14,280.27, or at all.

(c) Answering Paragraph VIII (c), of said Answer:

Denies there was any intent to evade any tax in any of said years, or at all. Denies Petitioner willfully or fraudulently kept any false or incorrect books of account or any other improper records. Denies there was anything willful or fraudulent in the keeping of any books or records at any time, or at all, or any failure to keep proper books or records required by law or otherwise showing the true income or true amounts or character of deductions or otherwise.

(d) Answering Paragraph VIII (d), of said Answer:

Denies any intent to evade any tax for any of said years or for 1942, or at all. Denies any willful or fraudulent acts or intent. Denies any and all allegations of understatement. Denies the income of the bar business in 1942 was \$8,887.03 or any other sum in excess of approximately \$172.13. Denies any rental income in 1942 in excess of expenses in the sum of \$303 or any other sum; and alleges all income did not exceed in rentals, losses occasioned by fire and destruction of the tenants in said period, and other expenses. Denies any interest income of \$22.44 in excess of deductible expenses in "other income."

(e) Answering Paragraph VIII (e), of said Answer:

Denies any intent to evade any tax for the year 1943, or at all. Denies that Petitioner acted willfully or fraudulently or any other wrongful purpose or intent. Denies any evasion of any tax or at all. Denies that her income from the bar was \$17,821.99 or any other sum in excess of approximately \$7,879.28, or that her "other income" was in excess of a loss \$28.60 and in this respect denies that her rental income was \$324.66 or any other sum in excess of a loss, or that her interest income was \$20.67 or any sum in excess of a loss.

(f) Answering Paragraph VIII (f), of said Answer:

Denies any intent to evade any tax for net income or to avoid any tax or at all in the year 1944. Denies that any of Petitioner's acts were willful or fraudulent or done with any other improper purpose. Denies that her income from her bar was \$22,596.49 or any other sum in excess of approximately \$5,091.98, as reported. Denies that she acted willfully or fraudulently or in any other improper manner in reporting her income from her bar or costs of her goods, or expenses or repairs or her rental income or depreciation or her interest income or any other item. Denies that her "other income" was other than a loss of \$1,295.74, and in this respect denies that her income from rentals was \$519 or any other sum or her income from interest was \$39.13 or any other sum.

Wherefore, Your Petitioner Catherine O'Connor prays: that the Court redetermine the tax and penalties and interest for the years 1942 to 1944 inclusive; and Petitioner incorporates her prayer of her Petition herein.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Lodged December 5, 1949.
Filed December 7, 1949.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and in accordance with leave granted by the Tax Court at the trial in this proceeding, amends his answer to the petition filed by the above-named petitioner by adding thereto the following allegations:

7. Further answering the petition herein, respondent alleges as follows:

(a) Petitioner omitted from gross income an amount which is in excess of 25 per centum of the gross income reported by her on her return for the year 1944.

(b) From January 1, 1942 to July 15, 1942, petitioner operated a tavern on Valencia Street, San Francisco, California, in partnership with one Victor Divers. The partnership filed a return for the year 1942 on which was claimed and allowed a deduction of \$525.00 for the annual liquor license fee for 1942.

(c) On July 15, 1942, petitioner bought out Victor Divers and became the sole owner of the tavern. In December, 1942, petitioner paid \$525.00 for renewal of the liquor license for the year 1943, and was erroneously allowed a deduction for said amount in the determination of deficiency and penalty for the year 1942, which is the subject of this litigation.

(d) There is accordingly due from this petitioner an additional deficiency in income tax and penalty for the taxable year 1942 in the amount of \$178.50 and \$89.25, respectively, over and above the deficiency in tax and penalty of \$2,226.05 and \$1,113.03 asserted by the Commissioner in his notice of deficiency for said year.

Wherefore, respondent prays that the Court re-determine the deficiencies in income tax and penalty herein for the year 1942 to be the amounts determined by the Commissioner, viz., \$2,226.05 and \$1,113.03, respectively, plus increased deficiencies in tax and penalty in the amounts of \$178.50 and \$89.25, respectively, claim for which is hereby made

pursuant to the provisions of Section 272(e) of the Internal Revenue Code.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal
Revenue

Of Counsel: B. H. Neblett, Division Counsel; T. M. Mather, Leonard Allen Marcussen, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed November 24, 1950.

[Title of Tax Court and Cause.]

REPLICATION TO AMENDMENT TO COMMISSIONER'S ANSWER

Now comes the petitioner, Catherine O'Connor, and answering the Amendment to the Answer, avers:

I.

Denies each and every, all and singular the allegations of Paragraph 7, (a) of said Amendment.

II.

That leave was granted to file only Paragraph 7, (a) in the above entitled matter, relative to a statute of limitations and the request for leave to amend as to other matters was not granted.

III.

That your petitioner, Catherine O'Connor, re-

ported on a cash basis, and any payments actually made for business licenses and/or taxes in the year 1942 were properly reported on a cash basis. That the partnership return was not questioned by the Commissioner notwithstanding it was prepared by the accountant Bosserman and all the deductions properly allowable by law were not taken by said accountant in preparing returns for the taxpayer. That having accepted said return as proper the Commissioner is estopped to deny it is improper or deductions are already taken therein, and the reopening of said issues as to deductions and whether properly taken in the accounting period of 1942 by said partnership or petitioner, at the conclusion of taking of testimony in the above entitled matter, seriously prejudices your petitioner and the trial of this matter in the above entitled matter.

IV.

That your petitioner's returns were on a cash basis for the year 1942, and renewals of licenses were properly taken in the year 1942, when paid in said accounting year. That the Commissioner has not made any order or demand for the changing of your petitioner's accounting from a cash basis to any other basis for the accounting period of 1942 calendar year.

V.

That it is unfair and inequitable to disallow a cash disbursement in the year 1942 for liquor license for the year 1943, after the trial of the issues

and reception of all evidence, without reducing the liability for the subsequent year, by amendment.

VI.

That if the Commissioner erroneously allowed a deduction for liquor licenses for 1943 in its notice of intention to assess and computations for the year 1942, instead of 1943:

(a) The Commissioner's computations for 1942 and 1943 are admittedly wrong and no presumption of validity nor correctness attaches to the computations of the year 1942, nor for the year 1943, nor is a prima facie case made from said assessment or computations;

(b) The Commissioner's computations for the year 1942 and 1943 being admittedly wrong by allegations contained in the Commissioner's pleading entitled "Amendment to Answer", the burden of proof shifts to said Commissioner for each of said accounting periods.

Wherefore, your petitioner, Catherine O'Connor, prays that the Commissioner take nothing by reason of his amended pleading, and your petitioner adopts her prayer in her Petition, and for such other and further, or other or further relief, decrees, judgments and/or orders as shall be meet in the premises.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed December 21, 1950.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Howard B. Crittenden, Jr., Esq., for the petitioner.

Leonard A. Marcussen, Esq., for the respondent.

Turner, Judge: The respondent determined deficiencies in income tax against the petitioner for the calendar years 1942, 1943 and 1944 in the respective amounts of \$2,226.05, \$6,837.81 and \$13,034.91, and 50 per cent additions to tax for such years in the amounts of \$1,113.03, \$3,418.91 and \$6,517.45, for fraud with intent to evade tax.

The questions for determination are (1) whether petitioner failed to report substantial amounts of income on her return for each of the taxable years; (2) whether rents assigned to pay expenses and principal payments on a mortgage on an apartment house which had been purchased by petitioner were taxable to her; (3) whether any part of the income herein was community income taxable only in part to petitioner; (4) whether the period within which respondent might assess and collect any deficiencies herein has expired under the provisions of section 275 of the Internal Revenue Code; and (5) whether any part of the deficiencies was due to fraud with intent to evade tax.

Findings of Fact

Some of the facts have been stipulated and are found as stipulated.

Petitioner is a resident of San Francisco, California. She filed her income tax returns for the years involved with the collector of internal revenue for the first district of California.

On January 1, 1942, and until July 15, 1942, petitioner and Victor Divers were equal partners in the business of operating a tavern and bar at 581 Valencia Street, in the Mission district, in San Francisco. She had acquired her one-half interest in the business in 1940, for \$1,000. She became sole owner of the business on July 15, 1942, when she purchased the interest of Divers for \$1,600, of which \$400 was from her savings and \$1,200 was money she had borrowed from the Morris Plan Company of California.

Petitioner had borrowed the \$1,200 from the Morris Plan Company on April 23, 1942, giving her note, secured by Thrift Account No. 19601, which account was carried in her former name of Catherine N. Larson. The balance in the account at that time was \$1,125.79. At December 31, 1942, she had reduced the balance due on the note to \$300, which amount she paid in a lump sum on February 2, 1943.

In the course of her operations, petitioner always had dice at the bar of her tavern, and many customers would shake "double or nothing" for their drinks. If they won, the drinks were free. If they lost, they paid double. Regardless of the turn of the dice, the advantage was with petitioner, since if she lost she was out only the cost of the ingredients of the drink, not the amount a customer would have

paid for the drink served. When petitioner was not present, her bartender would shake the dice with the customers. Petitioner would also roll the dice at the bar with customers for money. Play for money was largely restricted to the years 1943 and 1944. Little, if any, such play occurred in 1942.

In addition to the bar from which drinks were served, coin machines were available in the tavern for the diversion of the petitioner's customers. They consisted of a juke box or record playing machine, a pinball machine, and a claw machine. These machines did not belong to petitioner, but were placed there by the owners, under an arrangement whereby petitioner was entitled to fifty per cent¹ of the money played into the machines.

The partnership accounts had been kept in a book, referred to herein as the "gray" book. One column purported to show total receipts for each day and a second column the total expenditures or "pay outs" for the day. Other columns, which included among the headings Pur.; Miss.; Equipment; Rent; Adv.; Taxes; and Wages, purportedly carried a breakdown of the total expenditures or total "pay outs" for the day. In the keeping of that book, each partner had checked on the other. After her purchase of Divers' interest in the business on July 15, 1942, petitioner continued making entries in the "gray" book for July 16 through August 23, 1942. She made no entries in the "gray" book after

¹ As to petitioner's share of the money played into the juke box, there is some conflict of record as between forty per cent and fifty per cent.

the latter date, and after the thirtieth of July, there were no entries in the total expenditures or "pay outs" column, although there were entries in other columns showing details of some purported expenditures made during the period.

Sometime at or about the period mentioned, petitioner opened a new book, referred to herein as the "black" book. In this book she also made entries purportedly covering operations for the period July 16 to August 23, 1942. After the latter date, the "black" book was the only account book maintained by petitioner for the years involved herein. As shown by the entries in the "black" book, the receipts of the business for the period July 16 through August 23, 1942, averaged approximately \$17 less per day than the receipts shown for the same period in the "gray" book. In the "black" book, the first column purported to show total receipts for each day of operations as shown by the cash register. It did not show receipts from other sources. There was no column purporting to show total expenditures or total "pay outs" for each day. Entries indicating disbursements were made in columns under varied designations, among which were Liquor; Beer & Wine; Tobacco; Mixers; Food; Loans, Donations, Insurance; Personal; Policeman, Garbage and Garage; Light-Gas; Supplies; Rent; Wages; Taxes; Laundry, Bad Debts; Phone, Advertising. There were no entries showing the inventory of liquor or other stock on hand at the beginning or end of any taxable or accounting period.

During the years herein petitioner made entries

in the "black" book purporting to represent charitable contributions to the Red Cross, the U.S.O., the Salvation Army, the church and the poor. Most of these entries were false, in that the contributions indicated were not in fact made.

The juke box or music box was checked regularly each week by the owner. The checking of the claw and pinball machines was not so regularly done. The profits from the three machines and the winnings from the rolling of the dice at the bar for cash were not run through the cash register, but were put in petitioner's purse or a box kept at the counter. Losses from the rolling of dice for cash were paid from the purse or box, and not from the cash register. No record was kept in the "black" book or otherwise of the profits from the coin machines or of any winnings from gambling operations.

The Larson-Divers partnership had a checking account with the Mission Branch of The Bank of California from October 14, 1941, to July 16, 1942, when the account was closed and the balance therein of \$593.45 became the opening deposit in the checking account of petitioner. Petitioner's account was in the name of Catherine N. Larson, and was so continued throughout the years herein. From July 16, 1942, through December, 1944, petitioner made deposits in the account on an average of between seven and eight times a month. The deposits ranged from a low of \$13.60, on August 16, 1943, to a high of \$952.31, on December 26, 1944, the majority thereof ranging between \$100 and \$400. For

the year 1944, the deposits were made more frequently, on an average of nine times a month, and were, on the average, larger in amounts. These deposits were in part of money taken from the cash register through which all bar sales purportedly passed and in part from receipts of which no record was made.

From April 23, 1942, to August 22, 1942, petitioner also had a checking account with the American Trust Company. This account was opened on April 23, 1942, with a deposit of \$1,404, which included the \$1,200 petitioner had borrowed that day from the Morris Plan Company. The account was built up to \$2,197.40, at July 2, 1942. A check for \$1,550 cleared through the account on July 17, 1942, one day after petitioner had acquired Divers' interest in the tavern business. When the account was closed on August 22, 1942, the balance was \$58.12.

At the time petitioner's \$1,200 note to the Morris Plan Company was paid in full, on February 2, 1943, the balance in Thrift Account No. 19601, which had been pledged as security, was \$1,148.23. On April 15, 1943, \$750 was withdrawn for the purchase of a bond, leaving a balance of \$398.23 in the account. This amount was withdrawn on May 18 and applied with a check for \$351.77, drawn on the account at the Bank of California, to make \$750, for the purchase of a war bond. Account No. 19601 was reopened on June 22, 1943, with a payment into the account of \$2,600; \$1,465 was added on August 18, 1943; \$200 on August 25, 1943; \$1,000 on September 23, 1943; and \$228.95 on October 8, 1943.

On the latter date, October 8, 1943, \$4,750 was withdrawn, leaving a balance in the account of \$743.95. Payments into the account of \$725 on November 9, 1943, \$1,600 on September 28, 1944, and \$362.50 on October 25, 1944, plus credits for interest, brought the balance in the account at December 31, 1944, to \$3,467.01. Neither the "black" book nor any other record made or maintained by petitioner reflects the above payments into the thrift account or the source of the funds so paid in. Except for a withdrawal of \$38 on January 6, 1942, and the withdrawals heretofore described, no withdrawals were made from the account during 1942, 1943, or 1944. For the period herein, interest was credited to the account as follows:

To July 1, 1942: \$11.08.

To January 1, 1943: \$11.36.

To January 1, 1944: \$20.67.

To July 1, 1944: \$14.89.

To January 1, 1945: \$24.24.

The premises at 581 Valencia Street, in which petitioner's business was operated during the years herein, were leased premises. Above the bar were some rooms or apartments, which were also covered by the lease, the entrance thereto being at 579 Valencia Street. For a substantial part of the said years one of these apartments was occupied by petitioner. The others were rented to tenants. For the period from January 1 through July of 1942, the rent collected by the partnership on the said apartments was \$426. From August 1 until the end of the year, only one apartment was rented, on

which petitioner collected rent for August through December amounting to \$90. For 1943, she collected \$616 as rent on the apartments, and for 1944, \$1,228. None of the amounts so received as rent for the said apartments was entered or shown by the partnership or petitioner in either the "gray" book or the "black" book. To some extent, at least, expenses for water, lights and gas incurred in connection with the renting of the apartments were included among the disbursements listed by the partnership, and by petitioner in the said books. The same was true of that part of the rent paid under the lease which was allocable to the apartments.

On August 21 of 1943, petitioner contracted to buy an apartment house at 2710 Baker Street, in San Francisco, for \$17,000, of which \$7,000 was to be paid in cash. The remaining \$10,000 was covered by a deed of trust which had been placed on the property by Herbert Rosenbaum, its owner. Before leaving for duty overseas, Rosenbaum had engaged Maurice Hyman, who was petitioner's attorney, to represent him in all matters, including the sale of the apartment house. Under the arrangement, Hyman became the owner of a one-third interest in the property. Thereafter he negotiated the contract of sale with petitioner and, by its terms, was to collect the rents, pay the expenses and apply the balance to the payment of interest and principal until the \$10,000 covered under the deed of trust had been paid. In October, presumably on October 8, petitioner made a payment of \$7,000 in cash

under the contract and on or about October 15, title to the property was conveyed to her, subject to the outstanding trust. Petitioner had already paid \$500 in August, and upon conveyance of title was also given credit for \$101.55, being half of the October rents which had been collected from tenants. The \$7,500 in cash so paid, plus the \$101.55 of October rent, was applied first in satisfaction of the \$7,000 cash payment required under the contract, the title expenses and insurance and then to the \$10,000 due under the trust, leaving \$9,723.37 as the balance of the \$17,000 purchase price due and owing at October 15, 1943.

The \$500 payment made under the contract in August of 1943 was made by check on the Bank of California and was entered in the "black" book, under the column headed Personal. There was no check for or entry in the "black" book to show the cash payment of \$7,000 on October 8, or any other date. It does appear that \$4,750 was withdrawn on October 8, 1943, from Thrift Account No. 19601 with the Morris Plan Company.

For the months of November and December, 1943, the rent collected from tenants of the Baker Street apartments and applied by Hyman pursuant to the contract amounted to \$207.50 a month. For the year 1944, the rent collected was \$1,775. There were no entries in the "black" book or any other record kept by petitioner showing the amounts collected as rent on the said apartments.

In addition to the rents received by Hyman from tenants and applied on the balance due and owing

under the trust, petitioner made payments as follows:

November 2, 1943: \$1,500.47.

December 16, 1943: \$1,000.00.

January 1, 1944: \$1,000.00.

January 15, 1944: \$500.00.

January 26, 1944: \$750.00.

February 5, 1944: \$1,000.00.

March 24, 1944: \$1,500.00.

July 6, 1944: \$1,000.00.

July 20, 1944: \$798.40.

The trust was satisfied in full by petitioner's payment of \$798.40 on July 20, 1944, although Hyman apparently continued collecting the rents through October. After satisfaction of the trust, however, the balance of the rents remaining after payment of expenses was paid over to petitioner.

There is no record either in the "black" book or in the checking account of the above November 2, 1943 payment of \$1,500.47. Some substantial portion, if not all, of the said amount was paid in currency which was neither entered in the "black" book nor deposited in the bank. The above payments under dates of December 16, 1943, January 1, 1944, January 15, 1944, January 26, 1944, March 24, 1944, and July 20, 1944, were all made by check and were entered in the "black" book, in the column headed Personal. The July 6, 1944 payment of \$1,000 is shown in the "black" book in two \$500 payments; one of these \$500 payments was made by check.

On January 1, 1942, petitioner had no assets

other that her one-half interest in the tavern, an automobile on which a balance was still due, \$863.79 in Thrift Account No. 19601 with the Morris Plan Company, and her personal effects. At no time during the years herein did she receive any money or property by gift, devise, or bequest, except \$13 from the estate of a deceased uncle.

In March of 1942, petitioner married William B. Jost. They lived together until sometime in June of 1943. On June 22, 1943, petitioner filed suit for divorce, and on July 22, following, was granted an interlocutory decree. A final decree was entered on October 30, 1944. Except for a short period immediately following their marriage, they lived in one of the apartments over the tavern. At times after the suit for divorce was filed and prior to July 8, 1943, Jost insisted that petitioner allow him to sleep at the apartment and, against her wishes, he did at times sleep in the living room. After July 8, he at all times lived elsewhere.

At the time of petitioner's marriage to Jost, he was employed as a driver for Dacus Oil Company, and continued in that employment until August or September. During that period he would assist petitioner at the tavern in his spare time. After leaving the oil company, he was unemployed until June of 1943, when he went to work for Young's Patrol. In the interim, his only work was that of helping petitioner in the tavern. During that period, petitioner provided him with clothes, food, lodging and spending money. While living with petitioner, as above stated, Jost never received any of the profits

of the business, as such, or claimed any interest therein as his own. He never assumed or had control or management of the tavern nor of the income or profits therefrom. There was a mutual understanding or agreement between petitioner and Jost that the tavern business in its entirety was her separate property and that the income therefrom was her separate income.

In her verified complaint in the divorce proceeding, petitioner alleged that there was no community property. Jost did not enter his appearance or file an answer, and in the interlocutory decree, petitioner's complaint was taken as confessed, by reason of Jost's default. At a later date, Jost filed a motion to vacate the interlocutory decree and for leave to file a proposed answer making a community property claim against petitioner and in her property. The motion was denied and Jost took no further action and made no further claim.

On March 15, 1943, petitioner filed a partnership return of income for "Catherine Larson and Victor Divers" for the period "beginning Jan. 1942 and ending July 1942." Partnership net income was reported in the amount of \$4,232.10, of which fifty per cent, or \$2,116.05, was shown as petitioner's share.

For the year 1942, petitioner and Jost filed a joint income tax return on March 15, 1943. Reported therein were the wages of Jost from Dacus Oil Company in the amount of \$1,380, and \$2,116.05, representing petitioner's share of the Larson-Divers partnership net income. For that part of 1942 after

petitioner acquired full ownership of the tavern business, she reported a net loss of \$2,556.26. Net income was shown as \$777.29, which, after application of personal exemptions of petitioner and Jost, left no amount as being taxable.

For 1943, petitioner and Jost filed separate income tax returns. On his return, Jost reported \$1,105.89 as his gross income, being his wages from "Young Patrol Service." He stated on the return that he and petitioner had separated July 6, 1943. On the line provided to show credit of income tax paid for 1942, he noted, "Wife will take all credit."

On her return for 1943, filed on March 15, 1944, petitioner reported \$30,782.68 as the total received from the tavern. She reported no other income. Net profit from the business was shown as \$8,289.28, and after deducting \$255 as contributions and \$155 for taxes, net income was shown as \$7,879.28. She claimed credit for her sister as a dependent. The tax reported was \$1,707.75.

On her return for 1944, filed March 13, 1945, petitioner reported total receipts from her business as \$31,352.48, and the net profit therefrom as \$5,589.08. The only other income reported was \$2,484, as rent from "Frame Apartments," and after claiming \$480 for depreciation, \$1,362.27 for repairs and \$638.83 as "other expenses," net return from the apartment was shown as \$2.90. After expenses of the business, \$586.50 was deducted under the heading "Charities." A standard deduction of \$500 was claimed, leaving reported net income at \$5,591.98, on which the income tax was shown as \$1,131.67.

For none of the years did petitioner report opening or closing inventories or the cost of goods sold. Instead, purchases of liquor, beer, wine and supplies during each of the years were deducted from reported total receipts, in arriving at reported net profits, without regard to goods on hand at the beginning and end of the year.

The Larson-Divers return of income and the petitioner's income tax returns for 1942, 1943 and 1944 were prepared for her by a public accountant who had written a letter soliciting the business. Each year, a week or two prior to the final date for filing her income tax return for the preceding year, petitioner supplied the accountant with the "black" book.² He was not employed to make and did not make an audit for petitioner. In the course of preparing the 1944 return, he noticed or heard something which caused him to inquire whether petitioner was receiving rental income. Just how the rents and the charges thereto as reported were arrived at or determined, is not shown. The same accountant also prepared the Larson-Divers partnership return for the period beginning January 1942 and ending in July, 1942. In the preparation of this return, he had the "gray" book available.

Petitioner did not advise the accountant of the income received by her from the coin machines, the

² The testimony of petitioner and the accountant was contradictory as to whether or not petitioner had also supplied him with her bank statements, check stubs and canceled checks. Her testimony was that she did and his testimony was that she did not.

shaking of dice, or any other gambling activities, none of which had been entered by her in the "black" book. Neither did she inform him as to the false entries on the said book indicating that she had made contributions to the Red Cross, U.S.O., and the like, in the amounts stated. The "gray" book and the "black" book and other records kept by petitioner, whether shown by her to the public accountant or not, were wholly inadequate for reflecting her income for the years herein.

Respondent, in his determination of deficiency for 1942, determined \$6,320.77 as petitioner's net profit from business, as against a reported net loss of \$2,566.26, making a total increase in the business net income over that reported by petitioner of \$8,887.03. He made no change in the \$2,116.05 reported by her as her distributive share of profits from the Larson-Divers partnership. He also increased net income by \$303, representing rental income, interest of \$22.44, and \$54.50 representing an overstatement of personal deductions.

In his determination for 1943, the respondent increased petitioner's net income over the amount reported by her by \$14,280.27, representing the total of \$791.28.³ "income increased per audit of records": \$17,030.71 of other receipts not reported; \$324.66, omitted rent income; and \$20.67, omitted interest income, less increased business expenses of \$3,887.05. The respondent also disallowed the de-

³ This amount represented an understatement of sales per the "black" book.

pendency credit claimed by petitioner for her sister.

In his determination for 1944, respondent increased petitioner's reported net income by \$28,-301.10, representing unreported receipts of \$22,-596.49; unreported interest, \$39.13; rent understated, \$519; repairs overstated, \$218.03; reduction in apartment house operating expenses, by reason of personal occupancy of one apartment, \$510.23; adjustment to show cost of goods sold, rents, repairs, and other expenses, as against rents, repairs and other expenses and purchases made during the year as reported, \$3,936.32; and decrease in contributions claimed, of \$481. Deductions were allowed in an increased amount of \$2,821.42. This amount was made up of an increase in salaries and wages of \$1,171.90; increase in taxes on business, \$26.50; loss from theft, \$100; interest on apartment house obligation, \$20.37; taxes paid on apartment house, \$63.69; state income tax, \$44.96; increase in other expenses, \$289; and other losses and bad debts, \$505.

The deficiencies for the three years were due in part to the respondent's use of opening and closing inventories and the resulting determination of cost of goods sold.

Petitioner was tried and convicted in the United States District Court for the Northern District of California for willfully attempting to defeat and evade the tax imposed upon her, under the Internal Revenue Code, for the year 1942. At the same time, she was tried on a similar charge for the years 1943 and 1944, but as to those years, the

members of the jury were unable to agree upon a verdict.

Petitioner's income tax return for each of the years 1942, 1943 and 1944 was false or fraudulent with intent to evade tax and a part of the deficiency for each such year was due to fraud with intent to evade tax.

Opinion

In section 54 of the Internal Revenue Code, it is provided that "Every person liable to any tax imposed by this chapter * * * shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe." Under the regulations promulgated, section 29.54-1 of Regulations 111, it is required that "Every person subject to the tax * * * shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1."

In the instant case, the petitioner has admitted that in each of the taxable years she had substantial amounts of income which were not entered in the "black" book or any other record kept by her and which she did not report on her income tax returns. She also admits that various entries in the "black" book and on her returns indicating contributions

to the Red Cross, the U.S.O., and the Salvation Army were false and that such contributions were not in fact made. Sources of unreported income, according to petitioner, included coin machines in the tavern, the rolling of dice with customers and with her business competitors on Valencia Street, and various other gambling activities away from her place of business.

It is argued by her counsel that all of her receipts, both at the bar and from other sources, were regularly deposited in her bank account and that the "black" book, her bank statements and canceled checks constituted a complete record of all of her income and that upon examination of those records her correct net income could be determined. The difficulty with that argument is that the evidence is to the contrary. According to petitioner's own testimony, various amounts of her unreported income were received in cash and paid out in cash, and did not appear in the "black" book or pass through her bank account. The bank statements show that during the years in question petitioner made deposits in her checking account in the Bank of California on an average of seven to eight times a month, and in 1944, on an average of nine times per month. To what extent the money deposited was from receipts which had passed through the cash register and to what extent from unrecorded and unreported income, we do not know. In any event, the deposits did not include all of her receipts, and we have no way of knowing the amount by which her actual receipts exceeded those deposits. With

respect to disbursements, we have a similar situation. Disbursements were made both in cash and by check. Some were recorded in the "black" book and some were not. Where the unrecorded disbursements were by check, it is possible, in some instances, to draw a conclusion as to whether they were for business or for personal reasons. In other instances, it is not. The extent of the unrecorded disbursements which were made by cash is not shown, and, by the same token, we do not know the amount of the unrecorded cash disbursements which were made for business purposes or the amount so made for petitioner's personal pleasure and benefit.

It is well settled that where a taxpayer has failed to keep books or records as required by section 54, *supra*, and the regulations promulgated thereunder, and from which his or her correct income can be ascertained, the Commissioner has the right to look elsewhere for evidence. *Burka vs. Commissioner*, 179 F.2d 483; *Kenney vs. Commissioner*, 111 F.2d 374; *Bishoff vs. Commissioner*, 27 F.2d 91; and *Frank M. Wiseley*, 13 T.C. 253. See also, *Dawley vs. United States*, 186 F.2d 978; *Bell vs. United States*, 185 F.2d 302. The respondent not being able to ascertain the correct income of the petitioner for the years herein from petitioner's books and records, was obliged to search out the needed information and data wherever they might be found, and in the course of investigations, extending over a period of months, his agents examined and checked the "gray" book, the "black" book, petitioner's bank statements, canceled checks and check

stubs, and any and all records produced by petitioner. They interviewed persons and firms with which she had done business and individuals with whom she said she had gambled. They had a series of interviews with petitioner and her attorney Hyman and sought to have her check and verify such data and figures as to her operations as they had been able to obtain, and much of the data and figures so assembled were corroborated or admitted by her and Hyman in the course of the interviews and they initialed or made notations on certain schedules to that effect. On the basis of information so obtained, the respondent determined the deficiencies herein, which deficiencies are prima facie correct, and the burden of proving that her correct net income was other than that on which the deficiencies were computed is on the petitioner. See *Kenney vs. Commissioner*, *supra*, and the other cases above cited.

Except for a few specific items, dealt with hereafter, and aside from the previously discussed claim that all of her receipts were deposited in her bank account, petitioner's contentions generally are that the respondent's determination of her business receipts was arbitrary and that the figures used in constructing her business income are fictitious and have no relation to fact. Not only, however, has petitioner failed to show by records or otherwise the correct amount of her gross income or of her net income for the years herein, but, when we take into account the admissions made in the course of her testimony as to her unrecorded and unreported

income, we are not even able to determine what the amount is which she now claims as having been her correct income for those years.

One item to which specific argument has been directed is that of the unreported rents paid to Hyman by the tenants of the Baker Street apartments and by him applied first to the cost of operation and then to the principal of the \$10,000 trust. The argument, in effect, is that since she did not assume the trust lien, and during the interval from the date of purchase until the trust was satisfied on July 20, 1944, by her final payment of \$798.40, the rents were received not by her but by Hyman and by him applied as indicated, the rents so collected and applied were not her income. In support of this contention, she cites and relies on *Hilpert vs. Commissioner*, 151 F.2d 929, reversing 4 T.C. 473. The *Hilpert* case, as there decided, is not this case. The United States Court of Appeals for the Fifth Circuit held that the taxpayer had only a right of redemption, and was not the owner of the property in question. Here, the petitioner was the owner of the property by purchase and Hyman received the rents and applied them for her benefit. In short, she was enriched thereby, the rents having been applied in freeing the property from the charge against it to her financial benefit and gain. See and compare *Ward vs. Commissioner*, 58 F.2d 757, affirming 22 B.T.A. 352. The respondent in his determination has made allowance for expenses or other items chargeable against the rents received, and the petitioner has not shown error therein.

Although vague and indefinite as to amount and other essential details, counsel for the petitioner makes some argument to the effect that she should be allowed some added deductions to cover the cost of entertainment. While on her returns petitioner claimed no deductions specifically designated as covering entertainment expenses, there were one or more items on each return which might have included such expenses, and the respondent, in his determination of the deficiencies herein, made no disallowance with respect thereto. Furthermore, we have no such issue before us. The petition contains no allegation of error with respect to the allowance or disallowance of entertainment expenses. In passing, however, it may be noted that Jost, in his testimony at the second criminal trial, stated that there was not much entertainment, except at the bar. We have no reason to believe the situation was substantially different after Jost left, and, so far as appears, the cost of entertainment at the bar, such as free food and free drinks, was fully covered in respondent's determination of the cost of supplies and the cost of liquor sold.

Counsel for petitioner has directed a major portion of his argument to the claim that during a substantial part of the years herein the income from the tavern was community income and only one-half thereof is to be taken into account in determining petitioner's income tax liability for the years before us. In making this argument, he is not altogether clear as to whether in his view the community period contended for terminated with

the date of petitioner's separation from Jost, the date of the interlocutory decree of divorce, or the date of the final decree. If our understanding of the law applicable to the facts herein is correct, however, the period for which the claim is made is of no consequence, since in our opinion the income from the tavern was not community income, but was the separate income of petitioner. Furthermore, as to 1942, petitioner and Jost filed a joint return and, under section 51 (b) of the Internal Revenue Code,⁴ liability for any deficiency in the tax reported is joint and several. Whatever controlling effect *Cole vs. Commissioner*, 81 F.2d 485, cited and relied on by petitioner, may have had as to the question of joint and several liability in such a case, it came to an end with the Revenue Act of 1938, when section 51 (b) was enacted. Also, it is well settled that once the election to file a joint return is exercised by a husband and wife, the election is final and may not thereafter be changed. See *Lamb vs. Smith*, 183 F.2d 938, 943, and the cases there cited.

⁴ Sec. 51. Individual Returns.

* * * * *

(b) Husband and Wife.—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien.

Under section 158 of the Civil Code of California,⁵ either the husband or the wife may enter into any engagement or transaction with the other respecting property, which either might if unmarried. And, it has been held that an agreement between a husband and wife, by which the husband relinquishes all claims to the earnings of the wife, is one which relates to the acquisition of property by the wife and is an engagement or transaction respecting property within the meaning of section 158 of the California Code, *supra*. *Wren vs. Wren*, 100 Cal. 276, 34 Pac. 775. Furthermore, in establishing the existence of such an agreement, "resort may be had to circumstantial evidence. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to dispose of her receipts from that source, would be competent evidence and admissible to prove the agreement." *Kaltschmidt vs. Weber*, 145 Cal. 596, 79 Pac. 272. See also, *Perkins vs. Sunset Telephone & Telegraph Co.*, 103 Pac. 190; *Larson vs. Larson*, 15 Cal. App. 531, 115 Pac. 340; *Smith vs. Smith*, 47 Cal. App. 650, 191 Pac.

⁵ §158. Husband and wife may make contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts. [Enacted 1872.]

60; and Pacific Mutual Life Insurance Co. vs. Cleverston, 108 Pac. (2d) 405.

On the evidence, we are convinced that there was a mutual understanding and agreement between petitioner and Jost that the tavern business was petitioner's separate property and that petitioner's earnings, whether in the operation of the tavern or otherwise, were her separate income. Although under sections 172 and 172 (a) of the Civil Code of California the husband has the management and control of the community property, the contrary was true in the instant case. At no time did Jost assume or have control or management of the tavern business or of the income therefrom. At such times as he assisted petitioner in the operation he accounted to her for the things done and the moneys taken in. The bank account continued in petitioner's former name, Catherine N. Larson, and Jost never at any time had any right or authority to draw checks thereon. Between petitioner and Jost, the business and its proceeds were always treated and handled as belonging to petitioner. The interest of Divers in the tavern was purchased by petitioner with her own money and on her own credit. There was some vague or suggestive testimony that Jost's wages for the short period after the marriage during which he continued in the employment of Dacus Oil Company was commingled with petitioner's assets, to the end that the business and its assets were thereafter community property. Not only was this testimony unconvincing, but the entire course of conduct of the parties refutes such

a conclusion. There was no such commingling of Jost's funds as to affect the rights of petitioner in the tavern business or its profits. And finally, when the divorce was obtained, Jost defaulted and did not contest petitioner's allegations that there was no community property. It is true that after the interlocutory decree was entered on the basis of such default, Jost did file a motion to reopen the matter and for leave to file an answer making a community property claim, but, according to petitioner's testimony, this was after she had refused his importunities that she take him back as her husband and he was then using threats to the effect that, if she did not, he would take her business away from her. Furthermore, the trial court denied the motion, and Jost never pursued the matter any further.

After careful review and consideration of the evidence, it is our conclusion that petitioner has failed to show that the respondent erred in his determination of the deficiencies herein or that her correct net income was in an amount less or other than that on which the deficiencies were determined. In reaching that conclusion, we have not overlooked the argument to the effect that she is entitled to deductions in some unstated amounts to cover gambling losses. The argument made seems to be the aftermath of certain claims of deduction falsely made by petitioner on her returns for contributions to the Salvation Army, the Red Cross, the U.S.O., and other comparable organizations, which contributions were not in fact made and the claims therefor are now admitted to have been false. It was

petitioner's final testimony that the amounts in question were in fact gambling losses, which were entered in the "black" book as contributions, for the reason that she did not wish her "bookkeeper" to know that she had sustained such losses through gambling. On the basis of those statements, her counsel argues that she is entitled to gambling loss deductions, under section 23 (h) of the Internal Revenue Code, which provides that "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

Obviously, the deductions as they were claimed on the returns would not have been allowable, even though it be assumed that the petitioner finally told the truth when she testified that the amounts falsely denominated contributions to the Red Cross, and the like, covered losses from gambling, since no gains from gambling were reported on the returns; and under section 23 (h), *supra*, gambling losses are allowable deductions "only to the extent of the gains from such transactions." It is thus apparent that as made on the returns the claims, in effect, would have been claims for the deduction of gambling net losses, which the statute does not permit. It is now said, however, that much, if not most, of petitioner's unreported income was from gambling and that it follows, as a consequence, that her gambling losses, whatever they were in amount, but in any event those falsely claimed on her returns as contributions, are deductible. Frankly, we do not know whether any of the added income now admitted by petitioner and which she failed to re-

port represented gambling winnings.⁶ She did so testify, but after hearing her testify and observing her in the course thereof, we are unable to say that her final story is any nearer the truth than her first. We do know that in each of the taxable years substantial amounts of petitioner's unreported income were not from gambling on her part, but from the playing of the coin machines by her customers. Certainly none of the amounts now claimed as gambling losses represented losses from rolling dice for cash at the bar. According to petitioner's own description of her operations in that connection, she paid such losses in cash from her winnings which were neither entered in the "black" book nor reported on her returns. Thus only the net profits from dice at the bar could have been taken into account in the determination here. As a consequence, the most we are able to say with respect to the claim is that petitioner's final story was that she gambled extensively, particularly in the years 1943 and 1944, and that, while she couldn't explain it, she was very lucky and won substantially more than she lost. If such was the case, however, and she was the lucky gambler claimed, we are unable, on the record here, to say that such part of the added income herein as might have resulted from gambling was in excess of her net winnings.

A further claim made in petitioner's behalf is that the assessment and collection of the deficiencies

⁶ The respondent's agents were unable to verify her claims through the individuals with whom she said she had gambled.

are barred, under the provisions of section 275 of the Internal Revenue Code,⁷ in that her returns were timely filed and the periods prescribed in that section and within which the respondent might act had expired prior to his determination of the deficiencies herein. It is the claim of the respondent, on the other hand, that the returns were "false or fraudulent * * * with intent to evade tax," and, under section 276 (a) of the Code,⁸ the tax may be assessed "at any time."

That the returns were false is not a disputed

⁷ Sec. 275. Period of Limitation Upon Assessment and Collection.

Except as provided in section 276—

(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

⁸ Sec. 276. Same—Exceptions.

(a) False Return or No Return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

matter. Petitioner has admitted that substantial amounts of income were omitted from her returns and that some of the claims of deduction were false and did not reflect the truth. She denies, however, that the falsity of the returns was due to an intent to evade tax. Her contentions, in the main, are that she did not know that gambling winnings or income from coin machines were taxable income; that for the purpose of having her returns made, she turned all of her records over to an accountant who, she thought, was competent and depended upon him to make correct returns for her, and finally, that such errors as may be attributable or chargeable to her were errors due to ignorance and not due to intent to evade tax. While certain matter appearing in the record could not be taken as a favorable recommendation of the accountant's ability in preparing the income tax returns, we do not believe the petitioner's protestations that she thought she had made a true and correct return of her income and that none of the errors therein was due to any intent on her part to evade tax. We base this conclusion on impressions obtained from seeing and hearing her testify and from our examination of other evidence of record. Her testimony varied from time to time on many of the items involved and at times was in direct contradiction of that given at another. To illustrate, she at first declared that the purported charitable contributions as entered in her "black" book were, in reality, payments to the police and were so made because she did not desire to create a situation wherein the

recording of their names or a correct description of the payments might prove embarrassing to them. It was not until later that her testimony was that they represented neither charitable contributions nor payments to the police, but gambling losses. Whatever may have been the shortcomings of her accountant, we are convinced also that the omissions of income from the coin machines or other unrecorded sources were not omissions for which he was responsible, nor due to ignorance on the part of petitioner, but to an intent on her part to evade her just tax. Having so concluded, it follows that there is no limitation on the period within which the respondent was authorized and permitted to determine the deficiencies in issue herein.

The final issue is whether the respondent erred in his determination of the 50 per cent addition to tax, in each year, for fraud. In section 293 (b) of the Internal Revenue Code,⁹ it is provided that if any part of the deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency, in addition to the deficiency, shall be assessed, collected, and paid. On the evidence of record, we have concluded and found that a part

⁹ Sec. 293. Additions to the Tax in Case of Deficiency.

* * * * *

(b) Fraud.—If any part of any deficiency is due to fraud, with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

[Title of Tax Court and Cause.]

MOTION FOR RE-HEARING, FOR RECON-
SIDERATION AND FOR CERTAIN FIND-
INGS

To the Honorable Above Entitled Court:

Your Petitioner Catherine O'Connor and moves for a re-hearing on the issues of fact and law in the above entitled matter; moves for a reconsideration of the issues of fact and law; moves for findings of fact on the issues of the amounts of expenses and deductions for the year 1942; moves for a finding of fact on the issues of the amounts of expenses and deductions for the year 1943; moves for a finding of fact on the issues of the amounts of expenses and deductions for the year 1944; moves for a finding on the issue and motion for exclusion of evidence obtained by unlawful methods, and all evidence obtained as leads therefrom; move for a finding on the issue that the accounts and deficiency of the Commissioner were based upon the accounting, work and investigation of Special Agent Tormey, and that he was motivated by improper motives and the issues of his solicitations of considerations for himself and a blond girl friend during the investigation he made.

Said motion for a new trial will be made upon the grounds that the Court refused to permit the Petitioner to prove by the witness Krause the items and amounts of the expenses and deductions for each of the years, stating that all of the records and proof by the primary records and testimony and the Court would make its own accounts there-

from, and refused to permit the Petitioner to make proof by an accountant therefrom; that by reason thereof and the failure of the Court to make findings thereon, Petitioner has been denied Due Process of Laws, 4th Amendment, United States Constitution; said motion is on the further grounds that the findings are against the evidence, that the decision is against the law, and upon errors of law occurring at the trial, and excepted to by the Petitioner. That the motion for reconsideration is upon each of the foregoing grounds specified for a new trial. That the motion is made for specific findings upon issues presented at the trial covered in Petitioner's Briefs filed with the Court, and not covered in the decision.

That Petitioner requests that the Motion be heard and on the calendar of the Court when it sits at San Francisco. If under Rule 19b the Court in its discretion determines this motion shall be acted upon without placing the same on the Calendar of the Court at San Francisco, Petitioner requests leave to submit a written Memorandum in support of this motion setting forth in detail each point and specifying the reasons therefor on this motion in detail required by careful practice of law to properly present the motion for consideration by the Court.

February 17, 1954.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner

[Endorsed]: T.C.U.S. Filed February 18, 1954.

[Title of Tax Court and Cause.]

ORDER

The above-entitled proceeding was heard on March 17, 1954, on petitioner's motion for "Re-hearing, for Reconsideration and for Certain Findings." The motion, the memorandum of the petitioner with respect thereto, and the statements made by counsel for the respondent have been carefully examined and considered and the Court has found nothing therein which was not given full and careful consideration in the making of its findings of fact and in the stating of its opinion entered herein on January 22, 1954, and it is the conclusion of the Court that the motion is not well taken.

Premises considered, it is

Ordered: That the motion be and is denied.

Dated: Washington, D. C., April 6, 1954.

[Seal] /s/ BOLON B. TURNER,
 Judge

Served April 7, 1954.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

The above-named petitioner Catherine O'Connor hereby petitions for review of the "Decision" dated January 25, 1954, in the above-entitled matter, and from the whole thereof, and petitions for review of the "Order" of the above-entitled Court in the above-entitled matter of April 6, 1954, denying said

petitioner's motion for "Rehearing, for Reconsideration and for Certain Findings." Petitioner declares she seeks said review in the Circuit Court of Appeals of the United States, in and for the Ninth Circuit; states that at all times herein mentioned she was and is now a resident of the City and County of San Francisco, State of California, and has filed all her personal income tax returns, including the tax returns involved in the above-entitled matter, with the Collector of Internal Revenue, San Francisco, California. That the nature of the controversy in the above-entitled matter is the amount of income and deductions subject to personal income tax for the calendar years 1942, 1943 and 1944, for the redetermination of the said tax in each of said years, and the imposition of fraud penalties in each of said years.

Wherefore, petitioner prays that a review be had by said Circuit Court of Appeals of the United States, in and for the Ninth Circuit, of said "Decision" and of said "Order" and of the whole thereof, in the manner and form provided by law and the rules of Court, and petitioner prays generally.

Dated: April 20, 1954.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Catherine O'Connor,
Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed April 22, 1954.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 51, inclusive, constitute and are all of the original papers and proceedings, excepting Petitioner's exhibits (1, 3 through 6, 9, 10, 13 and 14 (2, 11 and 12 appearing herein as Respondent's exhibits, 7 being marked for identification only, and there being no 8), Joint exhibit 8-A, and Respondent's exhibits B through S, and Joint exhibit 15-T), which are separately certified and forwarded under separate cover, on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled: "Catherine O'Connor, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 24206" and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of June, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket No. 24206

CATHERINE O'CONNOR Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room, U. S. Appraisers Building, 630 Sansome Street, San Francisco, California, November 13, 1950.

Met, pursuant to notice, at 10:00 o'clock a.m.

Before: Hon. Bolon B. Turner, Judge.

Appearances: Howard B. Crittenden, Jr., Esq., Central Tower, San Francisco, California, appearing on behalf of Petitioner. Leonard A. Marcussen, Esq., (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing for Respondent. [1*]

Mr. Crittenden: At this time I want to object to Mr. Marcussen appearing in this case because of an incident that took place in April of 1950, and I am going to draw to your Honor's attention that it is a difficult thing for me to present. I trust your Honor appreciates my position here, and it involves a constitutional right, and a substantial right of my

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

client, and it is for that reason that I have to urge it.

In April of 1950, Mrs. O'Connor was enticed into the office of the General Counsel, in my absence, and there interrogated as to the merits of the case, which was contrary to my consent. I have the correspondence here that goes through and covers this.

Evidence illegally obtained or evidence, the source of which is obtained by illegal means, is not admissible in the Federal jurisdictions. That is the Federal Rule on this point.

In this case, counsel will undoubtedly call upon knowledge and matters of fact he illegally obtained, in cross examination of the witness, and I wish at this time to [3] offer in evidence, if I may—I believe you will stipulate that these are copies of the correspondence.

Mr. Marcussen: I will stipulate, subject to change.

Mr. Crittenden: These are my office copies of the letter of April 11, 1950, April 4, 1950, and this is Mr. Neblett's letter—Division Counsel—letter of April 10, and his letter of April 12. This covers this point, your Honor.

I have a stipulation which says they may be used as though they were the originals, and that the originals may be proofed.

Mr. Marcussen: No objection to the authenticity, subject to a detailed check with those letters.

Mr. Crittenden: Now, starting off on this——

Mr. Marcussen: Just a moment. I am going to object to their introduction in evidence, upon the

merits, or their going into this record. They have nothing to do with the issues in this case, and counsel's statement is patently false, that the taxpayer was induced into the office of the Technical Staff—enticed into that office—and I further state that the Respondent has no intention of introducing any evidence of what occurred at that conference. It has no materiality on the case.

I will further state to your Honor that we received no information from Mrs. O'Connor at that conference, except [4] a story as to her poor financial condition. That is what happened. She came into the office voluntarily, and I object to these being read into the record, these letters being read into the record, only for that reason.

The Court: Now, as I understand it, you are fixing to present matter for the purpose or in the course of a request that Mr. Marcussen be barred from participation in the case. Is that it?

Mr. Crittenden: That is right, your Honor.

The Court: Well, I will dispose of that right now. I am not particularly interested in any showing of that kind. Now, when it comes to evidence in the case, why, then I will rule on the admissibility of evidence.

Mr. Marcussen is the duly-assigned counsel of the government to this case, and so I will recognize him in this case. Now, if there is a question that comes up about the acquisition of testimony, and the way in which it violates any constitutional rights of the Petitioner, that is another matter and will go to the

admissibility of the evidence and its propriety and use in the case here.

Mr. Crittenden: Of necessity, anything that he learned from my client that he would use in obtaining evidence or in cross examination of her or examination of any witness, would of necessity go to this point, and it is necessary for me, your Honor, to present this question—if you wish to [5] reserve ruling——

The Court: I am not going to reserve any ruling. I am ruling that the motion is denied on that.

Mr. Crittenden: May I have these marked for identification? There are four letters.

The Court: But, when it comes to admissibility of evidence on the issues involved in this case, I will hear your objection.

Mr. Crittenden: I have to raise this timely, and this is the only way I can raise it, outside of presenting it through administrative channels.

The Court: I don't mind the record showing that you raised it, but I just don't want to waste any time on it.

Mr. Crittenden: But my record must be complete.

The Court: Let's get along with the record, then.

Mr. Crittenden: We have resolved a lot of problems and maybe we have passed them to your lap. I have here a certified copy of the transcript of the trial before the District Court, records which went to the Ninth Circuit in this case, and I take it that counsel will stipulate that this will be considered by the Court, that the witnesses appeared and the

Court may consider the testimony and any stipulations therein contained.

Mr. Marcussen: Wouldn't it be better to wait for that until after the opening statement? [6]

Mr. Crittenden: If you wish. I thought we would clear the deck.

The Court: I would rather have the opening statement now. [7]

* * * * *

Opening Statement on Behalf of the Petitioner
By Mr. Crittenden

Mr. Crittenden: So that your Honor will understand the issues as they are presented, this originally arose as a criminal indictment under an evasion of tax. It was tried twice in the District Court. Your Honor will have the benefit of those records before you. We are relying, for the most part, on the testimony taken there, rather than going through and culling and pulling out the matters that might be different issues here than there.

I appreciate that the issues are considerably different in this case than they were at that time. Secondly, after the three-year statutes ran in all three years of 1942, 1943, and 1944 a registered letter to the attention of the assessed was sent to my client—more than five years—as to the two years of 1942 and 1943.

There is a claim that my client, who ran a bar on Valencia Street, made more money than she reported in her income tax, and our contention is that, although the accountant, when he made this up, understated income, he also understated the

deductions by the same amount, and the result is approximately the same—undoubtedly more income than is shown, but also more deductions. [8]

The government contended there is a fraud in each one of the years and there was extensive testimony at the time of the first and second trials. I think it would be better to go into that in a brief, rather than to outline it at this time.

So, we have the deficiency of the Statute of Limitations. We contend that there is no understatement of the ultimate amount of taxable income, nor of tax for any one of the three years, and if there is, it is barred by the Statute of Limitations in this instance.

I think that will be of assistance in arriving at the point. The pleadings start off with the allegation where we set forth the letters, attacking the letters wherein there is the issue of the increase in claimed amount. The Respondent appeared in this case and plead the fraud.

Now, your Honor will find that most of this stuff that we have covered will appear in these records, so I don't think there is any need of rehashing at this stage.

The Court: All right, Mr. Marcussen.

Opening Statement on Behalf of the Respondent
By Mr. Marcussen

Mr. Marcussen: If your Honor please, this case involves deficiencies and tax penalties for the taxable years of 1942, 1943, and 1944. The penalties assessed are fraud penalties. [9]

The evidence will show, as counsel stated, that Petitioner here was twice tried upon a criminal indictment for evasion of her income taxes for those three years. The jury disagreed in the first trial and in the second trial disagreed as to the first count in 1942—or rather agreed on 1942 and disagreed as to the other two counts, covering 1943 and 1944.

It is true, as counsel has stated, that we intend to present this case by introducing in evidence the entire transcript of the evidence in the second trial, and I understand that counsel wishes certain other pleadings and papers. I wish to have the pleadings, but there are certain other motions which were made in criminal trial which he wishes to have in. While we object to the materiality, we have no objection to their going into evidence.

In addition to that, there will be presented and stipulated into evidence portions of the testimony that was offered in the first trial. The Respondent would like to offer specifically the testimony of the government's investigator in that case, Mr. Paul Tormey and the testimony of the Petitioner, Mrs. O'Connor.

The government would also like to introduce the testimony of two other witnesses who were representatives of Lachman Bros. Furniture Company here in San Francisco and also a jewelry store, I think it is Brilliant Jewelry Store. [10]

In addition to that, it has been our intention to present the case in as orderly a fashion on the stipulation, so that the hearing of the case may be facilitated.

Now, I won't go over at the present time the detailed allegations of error contained in the petition which are at issue here, but will proceed first to a consideration of one of the most important issues, namely, the fraud issue.

Fraud is established in this case by evidence which will show that this Petitioner obliterated her books, that she made false entries into her books, and that she failed to report substantial sums of income—interest and rental income—received by her on property that she owned, and also property that she held under lease; but primarily upon a very gross understatement of her business income.

The Petitioner operated a bar in the City of San Francisco, as counsel has stated, and during those years she purchased a one-half interest in that bar, several years prior to 1942, for \$1,000.

In that year, 1942, she purchased the other half and became the sole owner on July 15, 1942. The evidence will show that a partnership return was filed for the first half of the year 1942, and that no contest or challenge is given to the computation of the partnership, of that return which has been accepted by the government.

The evidence will show that the books for the [11] partnership—the records, rather, for the partnership, were kept in this gray book, which will be referred to in this trial. The evidence will show that she continued, for a period from July 15 until August 23, 1942, to keep her records in this book; that thereafter she obliterated the figures of receipts shown in that book, and transcribed them into a

new book, the black book, which she continued to use for the balance of the taxable years in question here.

The evidence will show that the items of receipts, as re-entered into that book for that period of time, July 15, until August 23, were on the average \$17 a day less than the receipts; for the period, for the corresponding period, in the gray book.

That covers the fraud issue, the government's case with respect to fraud is predicated primarily upon the understatement of those receipts which vary from approximately \$7,000 for the first and last half of the year 1942, to approximately \$20,000 for the years 1943 and 1944.

Now, there are other issues which are presented to your Honor by the Assignment of Error contained in the petition. Counsel has adverted to the fact that he has raised the question of the Statute of Limitations. Obviously that would have no application if the fraud penalties are sustained. Those assignments of error are contained in, I believe, the first five sub-paragraphs of Paragraph IV of the Petition. [12]

I think the evidence will show that with respect to the last taxable year, namely, 1944, that the Petitioner understated her gross income by an amount which is in excess of 25 per cent of the gross income reported by her return, so that, in any event, the Statute of Limitations does not bar the assumption of the defense for that year.

Respondent has not filed a pleading to that effect and Respondent will move, before the hearing is

over, to amend the pleadings to conform to the proof, so as to invoke the five-year Statute of Limitations.

The issue of fraud is raised by Assignment of Error No. 6 of the Petition. Then there follow Assignments of Error; 7 and 9 are to the general effect that there was no understatement of business income for the year 1942. Similar allegations to the same effect are made for each of the taxable years. Then there follows in Sub-paragraph 10 of Paragraph IV, allegation to the effect that the assessment is erroneous, in that it does not give the Petitioner credit for losses that she sustained. We know nothing about those losses, but we think the evidence—we do have evidence that will, I believe, demonstrate that she has been allowed everything that she would be entitled to in the claims that have been made heretofore.

Now, Assignment of Error 11 raises, I presume, a purely legal matter, or I shall call your Honor's attention to [13] the fact that, for the year 1942, the return filed was a joint return of the Petitioner and her husband.

She contends, in substance, I think, in this Assignment of Error, that it was erroneous to include her husband's income in her return for the first three months of the year, of the year prior to her marriage to her husband, in March, 1942. That is a purely legal matter, and I think the law will show that there is no error with respect to that point.

Now, calling your Honor's attention to Assign-

ment of Error No. 12, the Petitioner alleges that, for the taxable year 1942, the Commissioner erred in failing to give her credit, in charging her, rather, with her husband's one-half share of the community income. The evidence will show that the Petitioner married her husband in March, 1942, that he was employed at the time and continued to be employed by a third party for a couple of months after the marriage. Thereafter he discontinued that employment and went to work for Petitioner in her bar.

The evidence will show that she was divorced and filed a complaint for that divorce sometime in the year 1943, and that she alleged that there was no community property at that time. I should add to that that that divorce was a default divorce. There was no mention in the decree, the interlocutory decree or the final decree, of the property rights [14] of the parties. Under the decided cases in the California Courts, under that state of the pleadings, the judgment operates as an adjudication of the property rights of the parties, and established that, up to the time of the filing of that petition, or rather, complaint, by the Petitioner, there was no community property. That would therefore cover all the years 1942 and all of the year 1943 up to the date of her pleading in the divorce.

Now, with respect to the subsequent period following the filing of the complaint, the evidence will show here that the parties filed their returns and filed only their own respective income and, under the circumstances, it seems to me that that would preclude any contention to the effect that there was

any community property after the filing of her complaint in the divorce action.

Now, that assignment of error again is made with respect to all three of the years here.

Now, I refer to Assignment of Error 18 contained in Paragraph IV of the Petition, and it states there that the statement of 1943 tax does not give your Petitioner credit for other income (including rentals) as a loss of \$28.60. Respondent doesn't know what that assignment of error is. It is quite incomprehensible to us.

Now, turn to Assignment of Error 19, which is to the effect that she was denied a proper deduction of \$410, [15] for the year 1943. We will be prepared to show that she was allowed that deduction and, in addition, \$338.50, which she did not claim on her return.

Assignment of Error 21 appears to be a general buckshot assignment of error to cover anything that apparently was omitted, I presume, in view of the fact that the rules of Court require detailed specifications of error that we can disregard that.

Mr. Crittenden: I just didn't receive all that purported information, and 21 states it is not attached to the Complaint as referred to in that letter and specifies that any such claimed adjustment of disallowed deductions are erroneous. I don't know what they were. If they didn't serve me with a copy, I am not in a position to answer. I think it is quite comprehensible.

Mr. Marcussen: Well, for what purpose it may serve, I will state that I don't know what it refers

to. Perhaps counsel and I can work that one out.

Now, referring to Assignment of Error contained in Paragraph 23 of the Petition, it is alleged that the Commissioner erred in not giving your Petitioner credit for the loss of \$1,295.74 for other income (rentals), that is incomprehensible to us.

Now, turning to Assignment of Error 24, the Petitioner alleges error in not depreciating certain items over [16] the period of three years that were involved here, the value of certain fixtures, which she acquired when she acquired this business. I do not know now just what her case is predicated upon, but I am sure the evidence will show that there was no error committed in disallowing any item alleged here in that paragraph.

That covers the issues in the case, if your Honor please.

The Court: All right, you may proceed.

Mr. Crittenden: One point, I think, should be cleared up. There was conviction on the first count in the year 1942; however, in that trial and both trials, it was specifically argued by me that the charge for which the Defendant stood indicted involved the issues of fraud, and the District Court adjudicated that it did not. How I lost that point, I don't know, but that is the fact. We have an adjudication in that case. I am familiar with the rulings of this court that, ordinarily, a conviction for evasion of income taxes is *prima facie* a case of fraud for the government, but I am also familiar with the point that, if there is adjudication in that case, a direct adjudication of that point, then it

wouldn't be *prima facie* proof of a matter that was previously excluded as an issue in that case. I have the transcript here.

The Court: I don't know what the significance of your statement is. [17]

Mr. Crittenden: I will explain to your Honor. She was convicted under Section—whatever section she was tried under here. In the District Court, I should say it is ordinarily taken by the Tax Court as *prima facie* evidence of proof of fraud—conviction in the District Court. Now, that is ordinarily true, but where the District Court specifically adjudicates that, it does not involve the issue of fraud, then it would not be *prima facie* proof in that court, if your Honor follows me.

The Court: I hear what you say, but I don't know wherein I am going to have to deal with it. What do you want me to do?

Mr. Crittenden: I am just calling your Honor's attention to the fact that that will be one of the proofs.

Now, starting our case, I have here a number of volumes, 1, 2, 3, 4, and a supplement—four volumes of the transcript of the entire record of proceedings and pleadings in the District Court trial, involving Catherine O'Connor against the United States.

We are going to offer by stipulation—the Court may consider any of the evidence that was taken in that testimony. We will, of course, go over it in briefs and assist your Honor in picking out the important points.

Mr. Marcussen: Again, it is my understanding that our stipulation is that the only material that is offered in [18] evidence here is what was successfully introduced at the criminal trial. Is that correct?

Mr. Crittenden: Yes, but I understand—I am going to make an offer of proof of matters which were excluded and his Honor may rule on them.

Mr. Marcussen: But, as far as the stipulations are concerned, that covers merely the matter which was admitted in the District Court. Statements of Counsel and matters excluded and matters that were ordered out of the record are not a record in this case.

Mr. Crittenden: But there is another point. We stipulated to a number of things in that case, government counsel and I did, and the stipulations will still be binding.

Mr. Marcussen: Binding here, and I would like to add further that counsel assures me that there is a certified copy of this record, and I have not had an opportunity to read this particular copy in full, and I would like to reserve, make a reservation, subject to check, for any errors which may appear when compared with the official copy.

Mr. Crittenden: May I state this: This has the official certificate of the Clerk of the United States District Court. I obtained this from Mr. O'Brien, Clerk of the Ninth Circuit. It was certified by the Clerk; this was sent to the Ninth Circuit as a Mother Hubbard record in that case. It includes the transcript and such matters as that, so I want [19]

to be sure that what I am getting here is the proper record. I have to return this to Mr. O'Brien. It says here, "Return to Paul P. O'Brien, United States Court of Appeals, Box 547, San Francisco, California."

I had to sign the memorandum.

The Court: This is part of the Court of Appeals' records?

Mr. Marcussen: The entire transcript of the second criminal trial.

The Court: The record will show the agreement of the parties. The transcript is received, subject to agreement and understanding that it is part of the record in this case.

Mr. Crittenden: May I ask your Honor that, at the termination of this case, and when the matters of evidence are returned, that this will be sent to Mr. O'Brien, by the Clerk. If it is not, I am going to be in a very bad position, if this is lost, because I have signed a written statement of indemnity for any cost of replacement.

The Court: I am going to put some responsibility on you of calling the matter to the Clerk's attention, when the decision in this case becomes final.

Mr. Marcussen: Now, if your Honor please, at this time I would like to request that, on behalf of both counsel for the Petitioner and myself, that we may withdraw this record for use in preparing briefs, and all the exhibits in [20] the case, and submit to the Court when the briefs are filed.

Mr. Crittenden: That is agreeable, your Honor.

The Clerk: That is Item No. 5.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 5.)

Mr. Crittenden: I have the exhibits here which were offered, and some of them are marked for identification and some are marked "Admitted." They will be seen by the Court. I want to move that those matters which were marked for identification and excluded, when your Honor considers these matters, your Honor will consider and make independent ruling on each one of those points.

Mr. Marcussen: Those are not included within the scope of our stipulation, you understand.

Mr. Crittenden: I understand they are not admitted, but they are being put in for the Court's consideration.

Mr. Marcussen: No, they were not a part of the record in the criminal case. It was not so stipulated, and if there is anything else you want to offer, I would like to reserve objection on the part of the Respondent.

Mr. Crittenden: I will have to go through here.

The Court: I think, for the purpose of this case, documents excluded there would have to be offered here as a primary matter.

Mr. Crittenden: Now, I don't want to pick out each [21] page of the transcript and make an offer in the same form. I thought it would save your Honor's time if I moved for their admission, and your Honor can reserve ruling.

The Court: I don't reserve ruling. I try to make my record as I go along. I find that it is doing double duty to reserve a ruling, and then I am away from the trial, and it is a whole lot easier here when it is right here before me and I have both counsel before me to hear what they have to say, and make a ruling then.

Mr. Marcussen: There is another matter which should be called to your attention, and that is the numbering of these exhibits, and it is my suggestion that the same numbering that was used in the criminal trial be used here. It is the reverse of what we do here. I think the letters were assigned to the Defendant, and the numbers were assigned to the government, and if that is satisfactory to the Court, we will continue numbering by that procedure here.

The Court: No, I think that we will just have to, in using the exhibits from the other records made in the other procedure, use due care, when reference is made, to show it is that, because we have already started numbering, and I think, for the purposes of the court, it would be easier to do it that way than to try and reverse all of this.

Mr. Crittenden: I think they could be taken as a composite exhibit; otherwise, your Honor won't be able to find [22] what goes into the record.

The Court: Those are a part of Exhibit 5, those that are made a part of that record?

Mr. Crittenden: That is right. We will put all of these exhibits in with this record.

The Court: They are sub-2 to Exhibit 5. Now, this transcript is received as Exhibit 5, and all of

these, as I understand it, were documents and papers that are a part of that record.

Mr. Crittenden: That is right, your Honor.

The Court: And were received, so they are sub-exhibits to Exhibit 5 in this proceeding?

Mr. Crittenden: That is right, your Honor.

The Court: So we will move along in that way.

Now, these others—I don't know whether they were marked for identification or anything of that kind, but these others, even though they do have some reference to them in Exhibit 5 here, these, of course, having been ruled out here, that are being offered here, those that were received, will come in as primary exhibits here, if they come in.

Now, those documents you have in your hand, those envelopes, as I understood it, are documents that were received and are exhibits in the prior proceeding?

Mr. Marcussen: That is correct, sir.

The Court: They are part of Exhibit 5. [23]

Mr. Marcussen: Then all of the exhibits will be a part of Exhibit 5?

The Court: Well, those that were admitted, yes.

Mr. Marcussen: Then I presume at this time I should offer the exhibits which were offered by the government in the criminal trial.

The Court: Those that were made a part of the record.

Mr. Marcussen: I will offer them now.

The Court: You may later on want to—well, no. I think you would just have to proceed as if they were part of that record.

Mr. Marcussen: They are a part of that record, your Honor.

The Court: Now, let me see that bunch of envelopes there.

Mr. Marcussen: These are bank statements and checks, if your Honor please, and they were offered, I believe, as government exhibits.

The Court: I notice the stamp number 11,911. That is a docket number, or something.

The Clerk: Yes, the docket number of the Circuit Court of Appeals.

Mr. Marcussen: Offered in the criminal trial as government's Exhibit No. 6, if your Honor please; they really should not be offered at this time. [24]

The Court: I have already accepted them; if they are part of that transcript, I have accepted whatever was marked into evidence there. There are 31 of these envelopes.

Mr. Marcussen: Then, as a part of that exhibit, I will offer Exhibits 1 to 34, produced on behalf of the government. They are part of that exhibit. I have them arranged in file folders there.

The Court: They are a part of Exhibit 5 here.

Mr. Marcussen: May the record show what is going in now? That is, what exhibit?

Mr. Crittenden: I will read them out to you, if you wish me to. A, B, D, E, F, H, I, J, G, K, L, O.

The Court: All right; now, those numbers are exhibits numbers that were given to those documents in the prior proceedings and were not admitted?

Mr. Crittenden: They were admitted.

The Court: Those were admitted and constitute the part of the record—they are part of Exhibit 5 in this proceeding?

Mr. Crittenden: And part of Exhibit 5 consists of writing on one of the check statements which was blown up for the record.

The Court: The original is in.

Mr. Marcussen: G for identification, in the criminal trial. [25]

Mr. Crittenden: Here is a blow-up of one of the other exhibits of handwriting, as used by the handwriting expert. That is one of your exhibits.

Mr. Marcussen: This didn't get in the trial.

Mr. Crittenden: I forgot to put it in. The original is in the exhibit. This is a copy that the expert witness testified from.

Mr. Marcussen: If you forgot to put it in, I will stipulate that it may be offered. If, however, the record shows that this was offered and denied, Respondent will not acquiesce in admission now.

Mr. Crittenden: This is for the handwriting experts. I will show you the original that was used by the handwriting expert.

Mr. Marcussen: No objection to that.

Mr. Crittenden: Now, your Honor, the accountant wrote a letter to the attorney that was associated with me, on July 28, 1947. We proved the signature, and he says in here—this is put in for the purpose of showing the lack of intention of my client, and the lack of knowledge, and the fact that her accountant knew at the time because he says, "I was very much surprised"—

Mr. Marcussen: I object to his reading it into evidence.

Mr. Crittenden: I am letting his Honor know what I [26] have got here.

The Court: Let me see it.

All right, you are offering this?

Mr. Crittenden: In evidence.

The Court: Was this an exhibit in the other trial?

Mr. Crittenden: No, they ruled against me.

The Court: Now, these others that you have just covered, they weren't put in either?

Mr. Crittenden: Marked for identification, and this was marked for identification. The Judge ruled against me on this.

Mr. Marcussen: As I understand it, this is a copy of a letter from Mr. Bosserman, who was the taxpayer's accountant, and addressed to her attorney, Mr. Maurice Heyman, and this letter was ruled out in the trial below. It has no materiality to the issues in this case. That matter was passed upon in the criminal trial, and if this is offered in evidence, it is going to be necessary for me to call Mr. Bosserman here and go into details of the statement. It does not impeach him, in any sense. It is a self-serving declaration.

I might say that the basis, the entire basis, of the criminal trial here was to try everybody but Catherine O'Connor. The basis of the trial was to try the accountant and to blame it onto him.

The Court: Who is he? [27]

Mr. Crittenden: A government witness.

The Court: Called by the government?

Mr. Marcussen: Yes.

Mr. Crittenden: May I point this out? Mrs. O'Connor, in February, 1943, never having filed an income tax return theretofore, having no necessity for filing one, knowing that she knew nothing about income tax, this man represented himself as a skilled accountant with some 40 years of experience and licensed to practice before the Federal District Court—she provided him with all the information he requested, all of her books and records and even the government's disputed records, which is that instrument which they claim is the basis of the fraud. She made a complete disclosure—the gray book. All of this information, including the checks, were given to Mr. Bosserman, and Mr. Bosserman undertook to make out a return. He told her to sign it. She did it, and she sent it in and make a tax payment on the basis of that.

Then Mr. Bosserman appeared in this case for the government and, in 1945, delivered the gray book which they claim is the basis of fraud in this case, which was supplied to the accountant and used by him in making up returns, by his own testimony, he delivered that to Agent Krause in 1945 when the investigation started, and made no effort to communicate with Mrs. O'Connor in the matter.

Now, we have to show that she knew nothing about taxes, that she employed a person who was skilled or a person she believed was skilled. She relied upon his judgment and, having done that, would not be guilty of fraud, just because the gov-

ernment comes up with a different figure on the same information and same data that she had.

It is immaterial to this case that she had no knowledge and consequently there was no wrongful intent on her behalf and she had a right to rely on him. Now, this language shows the state of mind that she had and he had as of 1947, that she knew absolutely nothing about taxes and relied upon him in making up the returns. Now, that is the materiality, and I think it is quite material, your Honor, in the question of fraud.

The Court: For what purpose was it offered in that proceeding?

Mr. Crittenden: To show the question of intention.

The Court: Whose intention?

Mr. Crittenden: The state of mind of Mrs. O'Connor and Mr. Bosserman, that Mrs. O'Connor was relying on him.

The Court: Upon what ground was it ruled out?

Mr. Crittenden: I hate to say this, but the Judge ruled with the District Attorney on all occasions. He just said it happened after the return was filed.

The Court: For what purpose? [29]

Mr. Crittenden: Showing state of mind.

The Court: By whom?

Mr. Crittenden: Of Mr. Bosserman, that he knew she was relying on him when he made up the statement.

Mr. Marcussen: It is not an issue in this case. The only thing that is at issue in this case is Mrs. O'Connor's state of mind, as stated in 1947, three

years after the last year in question here, and it is simply a letter by Mr. Bosserman, the Petitioner's accountant, addressed to her attorney, Mr. Heyman, not offered to impeach Miss O'Connor, and certainly incompetent to show the taxpayer's state of mind.

Mr. Crittenden: Mr. Heyman wasn't a witness. Mr. Bosserman was.

Mr. Marcussen: The issue is the state of mind of the taxpayer. I would like to have her take the stand.

The Court: Who is Mr. Heyman?

Mr. Crittenden: Counsel with me in this case.

The Court: Is this the last one in that case?

Mr. Crittenden: Yes.

The Court: On the basis of statement of counsel, and the purpose for which it is offered, I shall sustain the objection in this case, because I don't think that it would be competent testimony or evidence for the purpose stated, that I can see.

Now, if there was something that I don't know about [30] Mr. Bosserman and his testimony, presumably there might be some reason for it, but I don't find that this would be proof of the matter which has been presented to me, so I will rule it out, and the other documents which have been listed, and have been agreed to, that is, the documents which were offered at the other trial, but were not made a part of the record—how many papers are there, Mr. Clerk? I know two of them were blown-up checks.

The Clerk: I count ten, if your Honor please,

and then these two so-called blown-up checks. That seems to be 14.

Mr. Crittenden: That one you have here is one that was admitted to evidence.

The Court: That one is admitted.

The Clerk: Then 13, if your Honor please.

The Court: 13 are received and made exhibits in this case, that is our exhibits, and show that there are 13 documents in there, in that envelope, and are made Exhibit 6 in this proceeding.

Now, the other one which was in evidence goes with it as a part of Exhibit 5.

Mr. Crittenden: May I have this marked for identification?

The Court: Yes, this letter will be given identification No. 7, for the Petitioner. [31]

The Clerk: For identification.

The Court: Yes, for identification.

(The letter referred to was marked for identification as Petitioner's Exhibit No. 7.)

The Court: Now, what did we have of those original papers that you were tendering in support of your original motion? You had those marked?

Mr. Crittenden: Those were the first four.

The Court: Four papers marked for identification? We have 1, 2, 3, and 4 for identification, and now we have 7 and, as exhibits in evidence, we have 5 and 6.

The Clerk: Correct.

The Court: All right, you may proceed.

Mr. Crittenden: Your Honor, we have here the transcript of the testimony in the first trial to which

counsel referred. I want to point out to your Honor that these are my own copies, and they may be marked up with pencil on there. I have a bad habit of doing that, and I want your Honor to disregard any pencil marks and I understand that Mr. Marcussen has the Court copies and can compare them and see if they follow.

Mr. Marcussen: Subject to check for errors?

Mr. Crittenden: Now, this consists of Volumes 1, 2,—some of these are bound into two volumes. I will just count the numbers that are marked. [32]

Mr. Marcussen: Do I understand that you offer the entire transcript?

Mr. Crittenden: I am going to pick out parts. That is what we are doing, as I take it. I will want testimony of a couple of the witnesses here, and I will point them out to your Honor.

Any markers in here with papers I wish you would disregard them. There are eight volumes here, bound up.

The Court: How many separate?

Mr. Crittenden: Ten separate volumes.

The Court: Ten separate batches here? That is, bound separately, which are marked for eight volumes of testimony. Are they offered as they are?

Mr. Crittenden: I am offering them as they are, and I am going to draw upon them for the testimony of Mrs. Mattick, and I think Bell, and I think you will want the testimony of Tormey and Mrs. O'Connor.

Now, we don't intend to put your Honor to the trouble of reading any more than what is specified.

Mr. Marcussen: And Mr. W. M. Roche, and Mr. Richard Akeroyd.

The Court: Now, as I understand it, it is agreed that the testimony of those individuals named by counsel for Petitioner and counsel for the Respondent, given at the time of the trial are to be made a part of the record in this case, [33] for the purposes of this case?

Mr. Marcussen: That is right.

Mr. Crittenden: That is right.

The Court: Maybe we will have to make that a joint exhibit.

The Clerk: Joint Exhibit 8-A.

(The document referred to was marked and received in evidence as Joint Exhibit 8-A.)

[See pages 355-387.]

Mr. Crittenden: Now, your Honor, I have a transcript of a part of the trial, and it was sustained by the Court, that fraud was not an issue in that trial, and it was also followed by the second trial, the same instructions were taken without change for the second trial.

Mr. Marcussen: Now, if your Honor please, this constitutes nothing more or less than a difference between government counsel and the counsel for the defendant, in the criminal trial.

The Court: Which trial?

Mr. Marcussen: The second criminal trial.

Mr. Crittenden: Followed in the second trial.

Mr. Marcussen: Now, the instructions to the jury are in evidence. The nature of the criminal trial is

enclosed by the evidence which has been stipulated in this case, which includes the pleading.

Mr. Crittenden: I have no objection to using this [34] form in the certificate of the clerk, rather than calling the clerk.

Mr. Marcussen: Subject to check for any inaccuracies; I don't raise any question as to the authenticity.

Mr. Crittenden: You could call the reporter and ask his present recollection.

Mr. Marcussen: It is not our purpose to go to all that trouble.

Mr. Crittenden: I didn't want to be in the position of being sawed off.

The Court: Now, where are we on this, then? You are offering this in evidence? Is that what you mean?

Mr. Crittenden: As part of the proceedings of this case.

Mr. Marcussen: The Respondent objects.

The Court: What is the basis of your objection?

Mr. Marcussen: The objection is that it is immaterial and merely shows the difference that was argued out in the trial below, as to a proper instruction as to what is the element of intent under the charge in the indictment, and counsel wished to have an instruction which specifically used the word "fraud," and government counsel, as I have just read that, pointed out that the word was not used in the statute, but merely referred to willful intent to evade the tax due, words to that effect.

The Judge gave adequate instructions to the jury.

Mr. Crittenden: There was adjudication that fraud was not an issue in that case.

The Court: What was the issue in that case?

Mr. Crittenden: Section 145.

The Court: What was the issue?

Mr. Crittenden: I thought fraud was an issue, but I was fooled.

The Court: Well, what was it? I understand there was a conviction for felony.

Mr. Crittenden: Yes, for 1942.

The Court: Well, what was the conviction for?

Mr. Crittenden: 145 of the Code.

The Court: What do you say it was?

Mr. Crittenden: I thought fraud, but the Court ruled against me. I mean the adjudication of the Court was something besides fraud. I still don't think it is a law, but I lost on the appeal.

The Court: As far as that is concerned, I don't know that we need to waste a lot of time on it here. The objection to this is on the ground that it is immaterial, and since we, as so often stated, have no jury to protect, we are the court and the jury; we proceed to make the record, and do not normally sustain objections for immateriality unless it is an obvious encumbering of the record, an undue encumbrance. [36] The objection will be overruled, and the exhibit will be marked Exhibit 9 in evidence. Of course counsel can make whatever argument he wants to make on his brief. He will probably make it anyhow, and then when we get it, we will look at it and see if we think it has merit.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

Mr. Crittenden: Your Honor, I have my office copies, a copy sent to me by Mr. Nestell of requests for work sheets for him to work on and make a comparison for the purpose of this trial, and the work sheets were refused. You will stipulate to that, so I will show you what I did receive was this photostat, two pages, that is all I received, no supporting papers with that.

I am offering these to show the demand and that they were refused, my letter of June 20, and Mr. Nestell's letter of June 20—Mr. Nestell's letter of July 10, and the reply I received was forwarded to Mr. Nestell.

Mr. Marcussen: As to authenticity, I don't have the file in which this material would be contained, so I would want to reserve an opportunity to compare the letters with the letters I have in the file.

Secondly, I want to say that there is a procedure in the rules of this Court for a statement of position of either party, and that no such motion was filed, and this is too late [37] to do anything about the failure to supply work papers.

A request was made for the detailed working papers which are very, very voluminous, supporting certain statements which were supplied to counsel at his request. That statement was a statement of the computation of the increase in net worth of the Petitioner, and also an independent statement, set-

ting forth a detailed statement of the income and expense for each one of the taxable years.

She has that information and she has the books, all the detailed information. What she is asking for is the voluminous detailed account sheets of our auditor who audited these books.

Mr. Crittenden: Your Honor will see that I received these photostatic copies. The accountant had them before him, and he found it wasn't sufficient to prepare the necessary information for this Court. The reasons why the demand was made——

Mr. Marcussen: If your Honor please, counsel informed me yesterday that he couldn't get his accountant to make an audit in this case. It took our own accountant anywhere from three to six months to audit the accounts and ascertain the true income of this petitioner, and he desires to avail himself simply of all the details of the computations of the government, instead of making his own audit.

He has the burden of proof. It amounts here to an [38] improper request for detailed audit papers of the agent who made the investigation in this case. Now, Petitioner has the burden of proof in this matter.

Mr. Crittenden: I am not an accountant. I am just a lawyer. I go to skilled accountants and he said he needed other things to go ahead. I said I would make the request for them. He said he would and went ahead and made a request and came up against a blank wall.

You know that in the years since 1942, a lot of water has gone under the bridge, and to go out and

make independent verification at this time would be impossible. The accountant needs those things to work from, and without those, he tells me he is unable to do it. The reasons in my demand are shown there, and I think if I do not have the proof, it is not my fault, and I want to show that.

Mr. Marcussen: There is no impossibility to make an audit in this case. If the government can make the audit, then the taxpayer can make the audit. This amounts to nothing else but a request for detailed evidence that is in possession of the government and the method of calculation supporting the deficiency. There is a method by which counsel could have requested this, under the rulings of the Court, and this is not the time to make the request.

Mr. Crittenden: I made a request for certain things, and I want to show, your Honor, that the deficiency sets forth [39] round numbers as per attached schedule, and not having the attached schedule, I raise this point.

Mr. Marcussen: I will clarify that for you right now. The schedules referred to a deficiency notice and are not the schedules on the returns of the taxpayer. There were no schedules attached to the deficiency notice. Those designations of schedules are designations of schedules appearing on the return of the taxpayer.

Mr. Crittenden: It says, "Schedule B, increase in other expenses, increase in salaries and wages, increase in taxes and business."

Mr. Marcussen: That is in the notice as it ap-

pears attached to the Petition, if your Honor please.

The Court: Where are you reading this?

Mr. Crittenden: Page 3, on "Adjustment to net income for the year 1944." For instance, deductions, Schedule B, "Increase in other expenses, Schedule C, "Increase in salaries and wages," Schedule C, "Increase in taxes on business," Schedule C, "Increase on loss."

The Court: Well, I take it—I don't have the return before me, but I take it that Schedule F of the return is "Other expenses." Is that what it is?

Mr. Marcussen: That is correct, your Honor.

The Court: That is merely designating its classification for the purpose of making the return, as I understand [40] it?

Mr. Marcussen: Just by way of identification.

The Court: Just descriptive, is that all?

Mr. Crittenden: I don't see any attached schedule on there.

The Court: It is a reference to where it should be on the return.

Mr. Marcussen: That schedule B is on the back of the first page, if your Honor please, and it shows——

The Court: Is that the '44 return? Schedule B, Income from rents?

Well, now, these references to schedules B and C certainly merely are designations of the schedule where they are supposed to be reported on the return.

Mr. Crittenden: If that is so, I entirely misunderstood the letter.

The Court: That is what that is.

Mr. Crittenden: I understood it was the schedule attached. I looked and couldn't find it.

The Court: Now, as to statements with respect to Schedules F and G, those are references, those are identification items, your depreciation, your Schedule B, increase in other expenses, Schedule F, is a reference back, or rather a reference from B down to F for detail as to what it is, because F is the explanation for depreciation claimed in Schedules B [41] and C. Schedule G is an explanation of Columns 4 and 5.

So those are descriptive mainly to tie this in with the return as reported. Those are identification marks.

Mr. Crittenden: When I read a report and it says, "Per Schedule so and so," and then refers like for instance to Schedule C, Increase in loss; Schedule G, \$100, I look to the paper to see where the schedule is.

The Court: All of this is on the return. Those are adjustments made with respect to matters in certain categories on returns, and that appears to be what that is. That is a logical conclusion to draw, because all of these adjustments, and a statement attached of necessity, to be plain, would have to tie in to show that it is an adjustment of figures on the return. Well, the figures on the return fall in the various categories as required by the form,

that some of the items be broken down in the schedules of the return.

I don't think that that is necessary.

Mr. Crittenden: I only misunderstood it, your Honor, and I was laboring under that misapprehension, until it was explained.

The Court: I presume that that was part of the matter back of documents offered here.

Mr. Crittenden: I was given this. Then I was told that that was my details. The accountant tells me it is not enough for him to work with. Maybe he is not skilled [42] sufficiently.

Mr. Marcussen: He had the books that our accountant had.

Mr. Crittenden: He said it was not sufficient. You will notice Mr. Barlow's testimony to the same effect, that it wouldn't be sufficient.

The Court: Who is he?

Mr. Crittenden: He testified in the second trial.

The Court: Who is he?

Mr. Crittenden: A witness, a certified public accountant.

The Court: What was his participation?

Mr. Crittenden: A witness for the defense.

The Court: Called as an expert accountant, or something of that kind, to give opinion?

Mr. Marmussen: Simply to a computation of the tax that was introduced in a criminal trial by the government and made no reference to these sheets or anything that is being discussed at the present time. He made reference only——

The Court: It couldn't very well have been to these sheets.

Mr. Marcussen: They were not in evidence.

He merely testified that he wouldn't, in substance, be able to compute the tax unless, for example, he knew how much of the exemption, for example, had been taken by the [43] husband of the Petitioner, and also stated that he would not be able to compute the tax unless he had an accurate ascertainment of the earned income, in order to compute the earned income.

Mr. Crittenden: He also testified what was necessary in an audit.

The Court: Now, as I understand it, we have here copy of a letter by Mr. Crittenden, under date of June 20, 1950, enclosing a copy of a letter he received from Mr. Nestell, of the same date, asking for work sheets of the government, although that letter is rather general, and I would not necessarily know just what Mr. Nestell wanted.

Now, while it is not here, I presume from the second letter, dated July 10, a copy of which I have here, to the technical staff from Mr. Crittenden, enclosing a copy of a letter received by him from Mr. Nestell, dated July 7, which indicates that certain schedules were received, but Mr. Nestell wanted something further, and now do I understand that these four copies of letters, the ones I have mentioned, and these two photostatic schedules are the sum total of the matters that you are now offering here?

Mr. Crittenden: That is right, and I also stipulate that I didn't receive what I asked for.

The Court: The truth is, I rather think that you did. These schedules are pretty full and quite descriptive. [44]

Mr. Crittenden: I had those before I wrote the letter.

The Court: Well, then, I think they are pretty full and complete, for the purposes here, and they state the determination, the categories, the character of the items, the allowances made and everything in there quite in detail, and certainly it would give an accountant the necessary leads for his verification of these matters from records in working up an analysis or a calendar statement.

So I will mark the four copies of letters, and the document that was supplied in evidence as Petitioner's Exhibit 10.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 10.)

The Court: Now, I would say that certainly with that detail and, of course, you say you had it before, well, from that detail, then, if there were matters that weren't clear to this accountant on it, and that he couldn't verify from records of this Petitioner, then certainly his request made was not of such character as evidenced by those sheets, to indicate any proper request for anything beyond that, because it is just broad and general, and now it appears to me that he should have given you something more to go on than your course was then on

the basis of specified deficiencies, to file your proper motion before going to trial on this case; [45] for further and better statement, if there was anything that couldn't be worked out, but at any rate, to show what actually transpired. Those matters are admitted in evidence and marked Petitioner's Exhibit 10.

(Discussion off the record.)

Mr. Marcussen: Counsel and I have discussed certain documents and if counsel has no objection, as he has stated he hasn't, I would like to offer in evidence the certified copies of bonds, purchased by the Petitioner in the year 1943, and I believe all of them were purchased in that year. They are material only to show the funds at her disposal during that year, and they tie into the net worth statement which has already been submitted to counsel, and which the government will introduce into evidence in support of the deficiency judgment.

The Court: Is there any objection?

Mr. Crittenden: No objection. I don't want to limit the purpose. I want the Court to consider them for whatever he wants to.

The Court: They will go in for whatever they show is material and relevant.

That will be Exhibit B in evidence.

(The documents referred to were marked and received in evidence as Respondent's Exhibit B.)

Mr. Marcussen: That is all at this time. [46]

* * * * *

CATHERINE O'CONNOR

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Crittenden): Where do you reside, Mrs. O'Connor?

A. I reside at 533 Valencia Street.

Q. And you are the Petitioner in this case?

A. Yes, sir.

Q. Now, when did you sell that Baker Street apartment?

These is no use, your Honor, in going back to all [69] the questions that were covered on the testimony in these trials before your Honor, so I am not going to repeat that matter.

The Court: You are making your case. So you go ahead and, if I have any difficulty following you, I will so state and we will meet the questions as we come to them.

Q. (By Mr. Crittenden): When did you sell that Baker Street apartment?

A. I think it was—I am not quite sure—but I think in the fall of 1945.

Q. And at that time, did you give up the apartment that you and your sister used there?

A. Yes, I had to give it all up, yes, sir.

Q. I notice on the statement here, on the net worth statement, there was some money for a hot water heater.

The Court: It is Exhibit 10, I believe.

(Testimony of Catherine O'Connor.)

Q. (By Mr. Crittenden): I see there is a water heater. Did you have water heater trouble?

A. Yes, it seems like when I bought the building there was an appliance or something belonging to the water heater that I didn't know about, like the PG & E owning the meters and things and anyway, after I took the place, they came and got this something, whatever it was, and it incapacitated the water heater, causing me to have to install a new water heater [70] for the apartment house.

Q. That was soon after you purchased it?

A. I believe so. I wouldn't be quite sure. It may be within three or four months, it might have been earlier.

Q. Now, you cashed in all your war bonds at the time you purchased the Baker Street property?

A. Yes, I wanted to explain, if I might, about some of those war bonds.

The Court: He will ask the questions.

Q. (By Mr. Crittenden): I just wanted to know about those. A. Yes, I turned——

Q. Here are two \$1,000 bonds, one purchased in April and one in May, 1943; and two more in August of 1943.

A. Yes. I turned these in on the property to Mr. Heyman. I bought the apartment house from Mr. Heyman, my attorney, and these were down payment.

Q. Now, those were cashed in at the time, as part of the transaction? A. Yes, sir.

(Testimony of Catherine O'Connor.)

Q. I understand two of them had to be held for a while before Mr. Heyman got his money?

A. That is right.

Q. Now, at the time Vic Divers sold out this business to you, what did the inventory consist of? [71]

The Court: The liquor store?

Q. (By Mr. Crittenden): It was a bar that you had down there? A. Yes.

Q. And Vic Divers was your partner?

A. That is right.

Q. You had bought a half-interest before 1942?

A. That is right.

Q. You bought the other half in July 1942?

A. Yes, I bought half-interest in 1940 with Mr. Gragan and then I bought Mr. Divers out in 1942. He bought Mr. Gragan out in 1941.

Q. What did that inventory consist of at the time you bought him out?

A. It wasn't very much, Mr. Crittenden, due to the fact that the liquor that we were just talking about had been stolen December 10, 1941, when they broke in and took a lot of it.

Q. Did you have a breaking-in in 1942?

A. No, sir, in 1941, December 10, 1941, when Mr. Divers was my partner.

Q. You had carried a very minimum supply, I take it?

A. Yes, it was hard to get anything anyway. It was hard to get liquor of any kind and stuff that I did have on hand was stolen. [72]

(Testimony of Catherine O'Connor.)

Q. Thereafter you only kept broken bottles?

A. What we could get, putting in rum and all that stuff to be able to buy a few bottles.

Q. Now, at the end of 1944 you had inventory, did you? A. Yes, sir, I did.

Q. Now, when you bought whisky or merchantable liquor during that time, in what manner did you buy it?

A. That is what I was just telling you. I would have to buy maybe——

Mr. Marcussen: I object. That was thoroughly covered in testimony in the previous trial and has no materiality here.

The Court: Now, she is being questioned on the issues and you may proceed.

Q. (By Mr. Crittenden): What did it consist of?

A. Just four or maybe six bottles, or maybe nine or sometimes, if we were lucky to get a case, I would have to buy maybe five or seven or sometimes ten cases of tequilla and rum and—not cordials, but mixes like Manhattans or cocktail stuff. They are still standing down there.

The Court: When was this you are speaking of?

The Witness: You are asking me?

By Mr. Crittenden: 1944? A. Yes. [73]

Q. Now, in 1944, did you have a lot of these types of rum and tequilla and cocktail mixes?

A. I still do.

Q. That was your principal stock at that time, was it?

A. Yes, sir, I used to have to run around, even

(Testimony of Catherine O'Connor.)

bring in beer and stuff, a case or two at a time. It was hard to get.

Q. And the inventory—there was an inventory prepared early in this case? Do you remember when Mr. Heyman and you went to the Intelligence Unit's office?

A. I was too confused down there with all of them saying this and that to me, that I may have said yes when I should have said no. I don't know what really did take place down there.

Q. And your inventory at the end of 1944 consisted, for the most part, of these things that you got on deals? A. That is right.

Q. Now, was there a market for those? Could you sell them to anybody at that time?

A. No, I still have it. I had to discount a lot of it since I moved into my new place and had to sell at a loss. I have got it all down in my books.

Q. You moved early in 1945 to the new place?

A. In the fall of 1945, September of 1945.

Q. Now, when you moved and you sold this place, can you tell the Court how much you received for some of those things you had in the inventory?

Mr. Marcussen: May we have that identified as to what he means?

(Question read.)

Mr. Marcussen: I object to that as assuming a fact not in evidence. The evidence will show that we are talking about the inventory at the end of 1945—I beg your pardon, 1944—and the sale of that material, after the taxable year, has no materiality

(Testimony of Catherine O'Connor.)

on the issues in the case, and it assumes that she has testified here that she sold those during the taxable year. She has testified to no such thing.

Mr. Crittenden: I am taking the position that inventory should properly be written off at its true value. At least at that time there was an actual market for the cats and dogs that people in the liquor business had to take, and I want to show what kind of prices and what the market was for that type of merchandise.

The Court: Let's get back to the question.

By Mr. Crittenden: I will reframe the question. Did you have any inquiries to buy any cats and dogs at or about the end of 1944? Did any dealers, any of the salesmen, come in and offer to buy, tell you the market price?

A. But such a terrific loss. I sold some, but some that I thought that I could sell on the bar, I kept.

The Court: For what?

The Witness: Various liquor companies. I don't remember.

The Court: That you were dealing with?

The Witness: Yes, sir.

Q. (By Mr. Crittenden): Now, you say a great loss. What do you mean by a great loss, for instance?

A. I mean I would have had to take about a third or a fourth of the true value.

Q. You mean the wholesale cost?

A. Yes, sir.

(Testimony of Catherine O'Connor.)

Q. Now, when you get into the wines, how about that?

A. It was the same way. The cordials had turned to sugar and some of the other stuff had become cloudy. I couldn't sell it.

Q. I see in 1942, you are charged with a piano. You had a piano at that time?

A. In 1941 we bought a little small piano for the club, a little Ivers-Pond.

Q. I see a price of \$66.95.

A. And then we turned that in.

Q. Is that the one for \$66.95?

A. No, we turned in the little Ivers-Pond for the Kimball Baby Grand that I used in the club, and I am still [76] using.

Q. When did you get the Kimball?

A. I got it in 1942, I believe. I wouldn't be sure, but I am sure I had it—or the early part of 1943. I am not sure. Maybe it was earlier. I am really not sure on that, your Honor, so I hesitate.

Q. That was used in the business?

A. Yes, sir, it is.

Q. Did you have any gambling transactions in the years 1942, 1943, and 1944?

A. Not in '42 or not in half of '43, when I was married to Mr. Jost.

Q. Did you shake over the bar?

A. Oh, yes. I thought you meant playing cards. Oh, yes, we all shake over the bar out there in the Mission, for drinks, double or nothing, yes.

(Testimony of Catherine O'Connor.)

Q. And when you make double, the customer pays twice as much? A. And it is rung up.

Q. When you lose, he just gets the drink?

A. The stock goes out, yes.

Q. Now, you go through here, through these books, and pick out the gambling losses that you had.

A. This is starting from July, 1942.

Q. Do you have entries in that year? [77]

A. I had no gambling then. I was married to Bill—outside of just on the bar for drinks. However, your Honor, I did do this. I didn't know how to put my losses down. Well, I will tell you what—we did gamble on the bar for money. I mean, just between the tavern owners and themselves, and I didn't know how to put it down and I will admit to you that I put it in, anything that I could think of, Red Cross, any donations that I could think of. I never thought of anything wrong; in fact, I never thought there was ever going to be any trouble, but I didn't know how to put it down for my book-keeper, and I just put in anything.

The Court: You mean the amount you lost?

The Witness: Yes.

Q. (By Mr. Crittenden): Now, the expense here in August, 1942, Red Cross, \$37.50?

A. Yes, that is a gambling loss.

Mr. Marcussen: Let the records show that she is referring to the righthand side, the righthand page under August of 1942, the first column.

The Witness: I do say that on the bar only.

(Testimony of Catherine O'Connor.)

This wasn't cards, because I didn't start playing cards until after Mr. Jost and I was divorced, but I say on the bar, the tavern owners, we would gamble for drinks and money. [78]

Q. (By Mr. Crittenden): Are there any other items on that page?

A. No, this Morris Plan, that was a payment to the Morris Plan.

Q. I ask you on the next page if you see an item there.

A. No, this was Morris Plan.

Q. Under "Donations"?

A. One bill I got, insurance, \$34.50, fire insurance. Now, on November 19, 1942, I put "USO, \$50," and that was a gambling loss. This was all for the Morris Plan.

Mr. Marcussen: If you Honor please, may I request that the witness be instructed not to refer to items that are not gambling losses?

Now, that last statement was, "This is something about the Morris Plan." I think it would help matters considerably if she talked about the items counsel asked for for the record.

The Court: When you find one that is within the range of the question, why, then, speak, but the others——

The Witness: In December of 1942 I got Red Cross, \$15 and USO, \$65. That was the same.

Q. (By Mr. Crittenden): Were those gambling losses?

(Testimony of Catherine O'Connor.)

A. Yes, sir. And again April, 1943 I have got USO \$65.

Q. Is it a gambling loss? [79]

A. Yes, sir. I got \$200 here, your Honor, in June of 1943. I got Liberty Loan. Now, whether I was buying a bond at that time and applying on one of these loans, I can't say for sure.

Q. But you think it was a gambling loss? Do you know?

A. I can't say for sure. It may have been applying on one of those. If it wasn't, it was a gambling loss. Again, in September, 1943, the amount of \$224, gambling losses.

The Court: How was that entered?

The Witness: Entered as "Donations, Red Cross." And then, your Honor, in October, 1943, I got "Last payment to Lachman, \$750." That was a gambling loss. I didn't want to show it in the books, all those losses. I didn't know gambling was taxable.

Q. (By Mr. Crittenden): We will go into that later on.

A. November, 1943, Mr. Mooney, \$29.90.

Q. That was a gambling loss? A. Yes.

Q. I have another one here, Tom Mooney, October, 1943, \$20.

The Court: That just shows the name of the man?

The Witness: The man I owed the money to, yes, sir, and then I am going back. I didn't read it to you. In September, 1943, \$45 to Mr. Mooney.

(Testimony of Catherine O'Connor.)

The Court: That is all the explanation on the books, is just——

Q. (By Mr. Crittenden): Just says "Paid to Mooney."

A. December of 1943 to Mooney, \$55; and again in January of 1944, \$25 to Tom Mooney. March, 1944, \$65 to Mooney.

Q. A gambling loss?

A. Yes, all of these I am reading are.

Mr. Marcussen: How was that designated in the book? May the record show that?

The Witness: Tom Mooney. I have got it written in there, loss gambling.

Tom Mooney, \$40 in April 1944, and \$80 in April of 1944. I got loss to Louie and I loaned one of the boys for gambling that I never got back, \$90 in May of 1944.

Q. Did you share in the gambling?

A. I would have, had he won, but he lost and never returned it. Again in November of 1944, I have got \$75 marked for the poor, for donations.

The Court: Donations?

The Witness: Yes. And also Red Cross, \$150, the same year.

Q. (By Mr. Crittenden): Was that a donation or was that gambling? [81]

A. A gambling loss and also in December of 1944, donation.

Q. How much?

A. \$125 and \$150. They are both gambling losses, yes.

(Testimony of Catherine O'Connor.)

The Court: That is the end of 1944, all right.

I think we had better have lunch, but before we do, just while it is fresh on my mind, what sort of gambling was this? Dice?

The Witness: No, we used to play cards, your Honor.

The Court: And Mooney was a participant?

The Witness: Well, yes, various ones around there. All the tavern owners, he was really the one that would let us have money, and he would loan it, you know. He had a little club over there, the Charter Club.

The Court: I was just a little curious about how it was that he appeared to be, from your losses there, a winner. He was putting up the money and you were helping him out?

The Witness: No, it was a little club that he had. We played legal and legitimate. It is called straight draw.

The Court: You were going to his place?

The Witness: Yes. [82]

* * * * *

W. M. ROCHE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): What is your business, Mr. Roche?

(Testimony of W. M. Roche.)

A. Installment Department of Lachman Bros. Furniture Company.

Q. Have you brought with you the account of Catherine O'Connor, Catherine Jost, or Catherine Larsen? She may be known by either one of those names or several of them? A. Yes.

Q. What is the business of Lachman Bros.?

A. Retail furniture and appliances.

Q. Are these the original ledger cards of her account and the business that you have produced here? A. They are, yes.

Q. And I notice that you have—is that a summary of the information that appears on those cards?

A. This is a summary by the year. [88]

Q. Did you prepare that? A. Yes.

Q. From those cards? A. Right.

* * * * *

Mr. Crittenden: Could I ask what the purpose of this is?

Mr. Marcussen: The purpose is to show the purchases at Lachman Bros. I think deductions were claimed by the taxpayer in this record for those purchases, to establish the amount, and also for the purpose of showing that, in fact, when she testified that a certain check in this book was to Lachman Bros., there was no balance of \$750 due at Lachman Bros.

Mr. Crittenden: I think she testified that was gambling.

(Testimony of W. M. Roche.)

Mr. Marcussen: I think that merely establishes it, then. [89]

* * * * *

Mr. Marcussen: I would like to offer them as Respondent's exhibit, the ledger cards, all as one exhibit.

The Clerk: That is Exhibit 11.

Mr. Marcussen: And then the summary statement which the witness testified to as Exhibit 12.

* * * * *

Cross Examination

Q. (By Mr. Crittenden): Mr. Roche, Mr. Nestell called you in May of this [94] year, inquiring as to the amount of the account of Mrs. Larsen, or Mrs. Jost?

A. I don't recall any party calling me. I wouldn't say that she didn't call. She might have called somebody in our office. We have quite a number of people in the office, and he may have called one of the bookkeepers.

Q. Do you have custody of those accounts?

A. Supervision of the accounts.

Q. And if any inquiry came in, it would be to you, wouldn't it?

A. Not necessarily. A lot of people work there, and I might be on vacation or ill or out to lunch, somewhere else.

Q. You know that Mr. Nestell did make an inquiry and was told you didn't have these?

A. Not to my knowledge.

Q. Nobody came to you and told you anything?

(Testimony of W. M. Roche.)

A. Not that I know of.

Q. If such an inquiry came in, would it have been presented to you?

A. I am not saying that it wasn't presented. In the course of six months, we handle a big volume of business. I couldn't state it being brought to my attention, but I don't recall. [95]

* * * * *

CATHERINE O'CONNOR

called as a witness for and on behalf of the Petitioner, resumed the stand, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Crittenden): Mrs. O'Connor, when we called a recess we were talking about gambling winnings and losses, referring to the year 1942. Did you shake for drinks over the bar?

A. Yes, sir.

Q. Did you shake for money?

A. Yes, sir.

Q. Can you tell me—or do you have any record as to how much you made or lost on the shaking for money alone, not for drinks?

A. Out in our location, among the people who are in business, it is not only customary, it is necessary in order to hold trade to shake for drinks; otherwise they go to some place that will, and during those years especially there were those who would come into the place and not only shake for

(Testimony of Catherine O'Connor.)

drinks, but the tavern owners, particularly, would shake for money among themselves.

Q. Now, as to money, do you have any record as to the amount you won or lost, or both, during the year 1942, at that tavern, over the bar, not for drinks, but for money? [96]

A. I have been very lucky. Not knowing anything about dice or anything, I was very lucky at shaking for drinks or money, and I will say that my gambling losses were quite a bit, but my gambling winnings were even more, and I didn't know what to do with them. I didn't have any knowledge that they were taxable, and so I just put all my winnings in the bank.

Q. You deposited them in your checking account?

A. Yes, sir, the only one I have.

Q. The Bank of California? A. Yes.

Q. Now, in 1942, did you keep any record of them?

A. No, sir, I didn't know they were taxable. I had no idea.

Q. Now, when you shook for——

The Court: In other words, you didn't enter them on your books, your winnings?

The Witness: No, sir, I didn't. I put it in the bank.

Q. (By Mr. Crittenden): Now, as to the double or nothing, when you shook for drinks, what did you do with the winnings on that?

(Testimony of Catherine O'Connor.)

A. I always rang that up, because if I lost, then I would have to pour the drinks free.

The Court: You would ring up the double as a single? [97]

The Witness: Yes, sir.

Q. (By Mr. Crittenden): And if you lost, you wouldn't ring up anything, would you?

A. No, I would have to buy the drinks.

Q. Now, during 1942, 1943, and 1944, what amount of your sales was done by this double or nothing? Do you know?

A. Oh, I would say perhaps—you mean shaking for drinks?

Q. That is right.

A. Well, I couldn't say exactly, but it would be anyway a fourth, maybe up to a half, because, as I tell you, anyone, you shake for drinks, or you don't get trade. That is all.

Q. And that would be reflected in your machine totals, wouldn't it?

A. Yes, sir.

Q. Now, I am referring to this black book, under the column of receipts, that is, January, 1944, there are a number of columns on the left. What does that represent?

A. The actual sales taken in.

Q. That is your adding machine total, is it?

A. That is the money that went through the register, of my receipts, my day's receipts.

Q. You had other receipts, didn't you, during that period of time? [98]

A. I had pinball and claw machines and music

(Testimony of Catherine O'Connor.)

boxes, your Honor. That wasn't never entered. Mr. Bosserman didn't even tell me that those things had to be entered.

Q. What did you do with that money?

A. I deposited it.

Q. In the bank? A. Yes, sir.

Q. But you didn't enter it in your adding machine or cash register totals?

A. I had no idea about it. I paid license on it and if there had been any thought come to my mind, it would have been that they were clear, because the licenses were paid on them.

Q. After you left your husband in the middle of 1943, did you have any gambling winnings?

A. Yes, I did. I won quite a lot.

Q. And in 1944, did you have any gambling winnings?

A. Yes, we used to play cards at this little club, my customers and my sister and myself. We would go down to a little place in Colma and we would gamble down there, business associates of mine and myself.

Q. Did you win or lose in that gambling?

A. I would lose sometimes, but my winnings always exceeded my losses. One time I won \$1,750 playing baccarat.

Q. What did you do with that? [99]

A. Paid \$1500 to Mr. Heyman, of the \$1750, on the apartment house.

Q. How about some of these bonds that are in evidence?

(Testimony of Catherine O'Connor.)

A. And the same with the bonds. The money I would win from shaking over the bar I would pay toward buying myself those bonds. That was in 1942 and 1943 I bought those bonds.

Q. I think all the bonds are in 1943.

A. I think I bought a couple in the latter part of 1942.

Q. Now, during this entire time, how often did you come down to the bar?

A. I was there practically all the time, only when Mr. Jost and I were married, he was there all day long and he would open up in the morning, any time he wanted, and he had access to the money and to the stock, and then the bartender would come on about noon and work until about eight o'clock, and then he and I together would take it at night.

Q. This was at night when you would do the shaking of the dice?

A. Yes, I was there every night. It was only at night that those things would come up. If the bartender shook during the day, or my husband, I don't know about that. I am just talking for myself.

Q. You waited on customers yourself?

A. Yes, sir. [100]

Q. Virtually every evening?

A. Every night, I have always been there, and then after Mr. Jost and I split up, I was there more than ever then, because I didn't have to keep house.

Q. Now, in 1943, it was in February or March

(Testimony of Catherine O'Connor.)

that you gave Mr. Bosserman the job of making up the first return, wasn't it?

A. Yes, it was for the income taxes for 1942, yes.

Q. Did you tell him what experience you had had with income taxes before?

A. He knew I didn't know anything. I don't know how I ever happened to get him, but anyway, he was sent to me or brought to me or something, and he told me that he was with the government for so many years, and he had had experience, and I didn't know the difference between a bookkeeper and a CPA, and I thought the man knew what he was doing.

He told under oath up there that he didn't even know I had a bank account when I paid him by check and every check and every book and everything was taken over to him.

Q. And he made out the returns for you?

A. Yes, he did.

Q. Did you provide him with all the books and records? A. Yes, I did.

Q. And then you——

Mr. Marcussen: What books? May they be identified? [101]

Mr. Crittenden: 1942.

Q. (By Mr. Crittenden): I am going to show you these two books and ask you if these are the books that you gave him.

A. Now, this gray book was a partnership book that we had up to the day that I bought Mr. Diver's share. That was July 15 of 1942 and my husband

(Testimony of Catherine O'Connor.)

Bill, Mr. Jost, advised me to open up another book entirely, and this was given to Mr. Bosserman, by whom I don't know. I couldn't tell you, your Honor, but I never seen this book with all this blurred stuff that was supposed to be mine. This is a book that I opened.

Q. The black one, you mean?

Mr. Marcussen: She never saw the gray book, is her testimony.

The Witness: Didn't see the gray book after the partnership, either Bosserman took it from someone else or how he got it I don't know.

Q. (By Mr. Crittenden): Now, referring to the checks, each month that you would get your statement—after you checked it over what would you do with it?

A. I would send it over to him.

Q. Did you put it in a bag, or keep it in anything?

A. During the first part, up until about July of 1944, I had a little register that only rung up to \$3.00, no tapes [102] or anything on the thing, and so necessarily there was no tape saved, no thought of saving it, and then after the other register was installed, I used to put the pay-outs and the tapes and whatever I had for him to bring up the papers at the end of the month, along with the bank statement, and then my sister, Mrs. Mattick—it is too bad she isn't here.

Q. We have her testimony in the record.

A. And she would take them over to Mr. Bos-

(Testimony of Catherine O'Connor.)

serman every month, either that or he would come and pick them up.

Q. You put these in a bag?

A. Everything that went on the bar, along with the day's receipts, along with the pay-outs, along with everything.

Q. And that was delivered to Mr. Bosserman for making the account for the first year of 1942?

The Court: When would you deliver this to him?

The Witness: You see, the sales tax is made up by the month, your Honor.

The Court: You delivered this to him by the month?

The Witness: Yes, sir.

Q. (By Mr. Crittenden): But you first employed him in the spring of 1943, to make up your income tax return? A. Yes.

Q. Did you give him the books at that time?

A. He had everything. [103]

Q. Did he come to your place of business?

A. That is when he came first himself and picked up everything. Mr. Jost can verify that.

Q. Did you tell him he was to make up the return for you?

A. That is why I employed him.

Q. And he brought you the return?

A. Brought it down himself, and Mr. Jost and I both signed it.

Q. Did he ever tell you it wasn't proper, or didn't have all the income?

A. He never told me a thing, gambling losses or

(Testimony of Catherine O'Connor.)

winnings or pinballs or claw machines—he used to have to fall over them to get to the back room. The place was only 25 feet wide.

Mr. Marcussen: May her testimony be in response to questions?

Mr. Crittenden: Well, I am trying to bring these things out.

Q. (By Mr. Crittenden): Mrs. O'Connor, when Mr. Bosserman came to you, did he ask for any other records than the ones you gave him?

A. He asked me for all records to bring up an income tax report and I gave him everything I had.

Q. And he did that for each of the years? [104]

A. And he worked right straight on with me up until the time of my indictment in 1947.

Q. Now, after 1944, was there anything after the return was filed, did he ever say anything to you about the gambling?

A. He never said a thing to me until I moved into my new club in September 1945. Then he came down one night and he was drinking and he called me up there alone to sit down and talk, and he said I might be getting in a little jam with the government, and I said why, and he said on account of the extra monies, and I said, "What extra money?" And he said, "Why, your pinballs and stuff," and I said, "You never told me they were taxable," and he said, "You ought to know that." And I said, "I didn't know it and you never said anything about it." And he said, "These gambling winnings," and I was surprised to hear that gamb-

(Testimony of Catherine O'Connor.)

ling winnings were taxable, and then he went on to enlarge.

Q. But that was not until after——

A. After September of 1945 when I got in the new club.

Q. Did he suggest anything about amended returns?

A. No, sir. Mr. Heyman wanted to make amended returns when we went in the office at first, when they first brought us in Mr. Heyman offered to make amended returns.

Q. When was that?

A. When the investigation first started. [105]

Q. You mean the time you went to the Intelligence Service?

A. Yes, that is what I mean.

Q. Now, there was testimony here about 13 cases of whisky.

A. He had access to the whisky and the register and everything, and there was no such a duplication of me marking up duplication of the 13 cases of whisky.

Q. He took whisky whenever he wanted?

A. You get he did, and lots of it.

Q. It was just at the time of the separation that the 13 cases came up?

A. That was when I discovered—that is when we had trouble over that, yes, and there were those—he said there was a lot of talk on the street. That is certain. There still is, but this party came and told me and he heard——

(Testimony of Catherine O'Connor.)

Mr. Marcussen: I object.

Q. (By Mr. Crittenden): You heard that your husband had taken it? That is when the family fight started?

A. Yes, and he sold it for \$2,000.

Q. Now, did you have any theft losses?

A. Yes, when Mr. Divers bought——

Q. I am not talking about 1941. I am saying in 1942, did the bartenders ever take any liquor? [106]

A. Like all bartenders do. You know, I mean, whether they take the money out of the till or whether they pour free drinks, it amounts to the same. It is all money.

Q. And you had that during the entire time?

A. And Shannon who got up and testified and lied.

Q. His testimony——

A. He drank a fifth of whisky every day before he could even get started.

Q. One thing I didn't go back to——

Did you rely on Mr. Bosserman's amount of return? A. Yes, I did.

Q. Did you ever total the amount of money you had? A. No.

Q. Did you total expenses? A. No.

Q. You relied entirely on him?

A. I had never paid an income tax before, because I never made enough.

Q. Referring to this black book, did you ever run any columns, or add up any amount in here? For instance, July?

(Testimony of Catherine O'Connor.)

The Court: What year?

Q. (By Mr. Crittenden): 1943.

A. You mean to total these here like this? Why, yes, I totalled these, but he went over them. Mr. Bosserman had [107] the book and he went over them. He didn't tell me they weren't right. I would add them all up.

Q. Did you make any balance sheet on those?

A. No, sir.

Q. You never set up a profit and loss?

A. I didn't know nothing about that, just totalled the sheet up and gave him the book at the end of the month.

Q. For instance, April, 1943, I see some numbers. A. This is all here, his here.

Q. He didn't total those? A. No.

Q. We are referring to all receipts.

A. This is all the receipts I totalled.

The Court: The day's receipts?

The Witness: Yes, sir, the rest of this I didn't do any of this.

Q. (By Mr. Crittenden): You didn't run the other totals here? A. No, I didn't.

Q. All you know is that you had bills to pay and how much money you had to pay them?

A. Every bit of money I would get in, I would put in the bank, no matter if it was gambling, if I was lucky enough to win, or if it was the pinball or the claw machine or the music box, they never even gave me a slip for it in those days, [108] not even the music. I didn't even get a slip.

(Testimony of Catherine O'Connor.)

The Court: Who do we mean?

The Witness: I mean the owner of the music box.

Q. (By Mr. Crittenden): How did you put in the music box, on what basis?

A. 50-50. No, I take that back, it was 60-40. They got 60 and I got 40. I bought records and service.

Q. They opened the box? A. Yes.

Q. And would give you whatever was the amount? A. Yes.

Q. And the claw machine and the pinball machine? A. 50-50.

The Court: Were you there when these machines were opened?

The Witness: Not always.

Q. (By Mr. Crittenden): How would you know what the receipts were?

A. I wouldn't know. Either my husband or the bartender, and they would tell me what was left there for me.

Q. And you put that directly——

A. In the bank, yes.

Q. Now, there was some rental income on property. What did you do with your rents?

A. Those rentals didn't amount to anything. There were [109] two apartments.

Q. Let's find out what you did with the money.

A. I deposited in the bank \$20 a month was all it was.

(Testimony of Catherine O'Connor.)

Q. Now, during this time, what did you do for living expenses?

A. Well, I would take it out of the business there, I mean, I would take it out of the receipts of the money. I mean I never kept track individually of what we were spending, because we were working all the time.

Q. Did you write down your personal expenditures in your book?

A. Some I would and some I wouldn't, and I would cook upstairs and bring it down and maybe serve it on the bar, make sandwiches, or, I am always giving little parties there to bring in trade.

Q. Did you do entertainment during that time?

A. Always at Christmas time, and I still do, a little Santa Claus and a gift for everybody.

Q. How about entertainment at the apartment that your sister had?

A. The only time I ever got to go over to the apartment house was after I would get through at night. I would take a bunch over and we would sit and play cards and I would cook up a big dinner. It was business. Just for business.

Q. How could you get business out there? [110]

A. Just by being a good fellow and by throwing a little party once in a while, just being a fine person, that is all.

Q. Did you ever buy gifts for people?

A. If it was their birthday, I still do, or a wedding party or something like that, I would have a cake made. I still do.

(Testimony of Catherine O'Connor.)

Q. How about gifts for birthdays?

A. The same way. I would give them pairs of stockings or something. It was all for business—I mean it was a continual thing, because I was trying to build up a trade.

Q. Did it have the effect of building up the trade?

A. Yes, I still have the same customers, yes.

Q. Now, when Vic Divers left, did he take any of the business with him?

A. Yes, some he took.

Q. Did you keep about the same volume of business, or more?

A. No, more. I had my own customers.

Q. Your own customers stayed with you?

A. Yes, you bet.

Q. Then you kept bringing in more customers?

A. One will tell another, yes.

Q. And your friends bringing in their friends? Lodge?

A. That is right, I belong to the Moose Lodge, and the Ladies Auxiliary come in there. [111]

Mr. Crittenden: That is all.

Cross Examination

Q. (By Mr. Marcussen): Now, you say it is your testimony that you didn't see this book after July 15, 1942?

A. No, I didn't. My husband told me to open up another account, and I did. You have shown me that before.

(Testimony of Catherine O'Connor.)

Q. Let me finish my question. I show you Pages 12 and 13 of the book, and it shows certain entries here for expenses. A. Yes, sir.

Q. And I ask you whether you entered those in there?

A. My husband and I both did.

Q. Does your handwriting appear there?

A. This is my handwriting here, \$76, but Mr. Crittenden, it wasn't as of a certain date. We would just enter them in the book any place, just like I entered them in the book.

Q. What were those expenses for? Now, before we go on to that, please tell me what else is in your writing there.

A. These are all my writing, sir, \$22.50. I got expenses. I don't say what it is. It is for \$17.50, and then I got \$30, turkey, telephone, present to a girl on the bar there named Ethel. It was her birthday and I gave a party and cooked a turkey. I got rent \$30, gas and lights, \$2.50. I got drinks.

Q. How about that extended \$3.50? [112]

A. \$3.50, hamburgers, and \$2.50, ball game. No, that is Bill's writing.

Q. You say that is your husband's writing?

A. Yes.

Q. And that writing?

A. This is mine, right here, but that is not mine.

Q. Now, just a moment. On Page 13, the \$3.50, that is your writing? A. Yes.

Q. And the item extended to the right of that, \$2.50, ball game. That is not your writing?

(Testimony of Catherine O'Connor.)

A. No, that is my husband's writing.

Q. Now, please go back to the next line on Page 12.

A. \$5.00 for groceries.

Q. That is yours, is it?

A. Yes, sir. Then cleaning house, \$1. I gave somebody \$1 for cleaning house, and then this is my husband's writing.

Q. Groceries, \$2.75?

A. Yes, sir. This is his writing.

Q. I will ask you the questions, so this may be identified for the record.

The next line—I will ask you——

A. Cab and drink. Evidently I paid somebody's cab fare.

Q. What is the amount shown there?

A. \$1.50. [113]

Q. And then on the next line and extended over to Page 13?

A. That is my husband's.

Q. A pencil entry.

A. \$4.30 for groceries.

Q. The next line, Page 12.

A. That is mine, jewelry, \$6.

Q. The next line, Page 13?

A. My husband, eats and drinks, \$6.

Q. Now, I call your attention to the fact that those entries on Page 12 are listed opposite dates 1, 2, 3, 4, 5, 6, 7, and 8 of August.

A. I didn't make these, Mr. Marcussen.

The Court: Didn't make what?

The Witness: Any of these on this side, no, sir.

(Testimony of Catherine O'Connor.)

Mr. Marcussen: And why were these put in here?

A. Like I told you in the back, or further back, you can see we just made a notation, both Bill and I, not as of any date, when it was occurring, just for our own record, of what we were taking.

Q. (By Mr. Marcussen): Hasn't this book been prepared by the month for each two pages?

A. This ended here, Mr. Marcussen, and this here.

Q. What ended where? Now, you are referring to Page 10? [114]

A. Yes, July when I bought Mr. Divers out.

The Court: Now, you are referring to what? What ended?

The Witness: For me having the book here.

Q. (By the Court): You mean prior to that, are entries from the business?

A. It was a partnership up to July 15.

Q. And the partnership business entries ended at that point, there on that page?

A. July 15.

Q. (By Mr. Marcussen): Page 10?

A. Yes, sir, but those, just like I told you.

Q. Now, I call your attention to the fact that, on Page 12 there are certain entries for receipts and it is your testimony, is it, that those are not in your handwriting? A. They are not.

Q. You never saw those entries at all, at any time? A. No, sir.

(Testimony of Catherine O'Connor.)

Q. And those entries for receipts are obliterated by ink? A. Scratched out.

Q. Can you account for that? [115]

A. No, I told you that in two trials.

Mr. Crittenden: You didn't tell this man.

The Court: I just have to guess what comes in here.

Q. (By Mr. Marcussen): I will show you, if your Honor is interested in looking at this, these are the admitted entries.

The Court: Page 12?

Mr. Marcussen: Some of the ending entries over on Page 13, the ballgame and other items for groceries were in her husband's handwriting.

Q. (By Mr. Marcussen): Now, these are the entries which she denies making, and those are the entries for the receipts.

I would like to call your Honor's attention to the fact that, just for the record, in the trials below, in the criminal court, expert testimony was offered on behalf of the government.

The Court: It is in the record.

Mr. Crittenden: Both ways, your Honor.

The Court: I don't believe I have had very many cases where handwriting experts were called that both sides seemed to have any difficulty getting an expert.

Mr. Marcussen: There was some difficulty in this case.

The Court: That is the situation in cases where [116] there is opinion of value coming in.

(Testimony of Catherine O'Connor.)

Q. (By Mr. Marcussen): Mrs. O'Connor, about the water heater. You testified about that. Do you recall how much you paid for it?

A. I don't know offhand.

Q. Was it approximately \$300?

A. Yes, something like that.

Q. And I think you testified that you purchased that three or four months after——

A. I said I wasn't sure, Mr. Marcussen.

Q. You can't ascertain it? Let me finish my statement. I think your testimony was that it may have been about three or four months after the time you purchased the apartment?

A. Wait a minute now.

Q. Now, the apartment was purchased, was it not——

A. If you will just let me think—I bought the apartment in the fall of '43, and it was, I think it was some time—now, I am not sure—for sure—but I think it was some time in the summer, I believe, of '44, I believe it was. I believe it was. I am just saying I think, because I don't want to be pinned down on it, but it had to be some time in the year of 1944.

Q. It is in your interest to be pinned down, so we can get it in the proper taxable year.

A. You wouldn't want me to lie about dates, would you? [117]

Q. Certainly not.

The Court: You give it to the best of your

(Testimony of Catherine O'Connor.)

knowledge, and if you don't know, why, of course you can't testify.

Mr. Crittenden: I believe it appears in the evidence, the exact date, in the record that we have here.

Mr. Marcussen: I will pass over that.

Q. (By Mr. Marcussen): Now, is it your testimony that you hired Mr. Bosserman to do some monthly work for you by way of auditing your records? A. Yes, I did.

Q. When did you first do that?

A. He made up the first report for the income tax in 1942.

Q. I am asking you whether you ever hired him to audit your books and records, Mrs. O'Connor. I am not talking about the income tax.

The Court: She is fixing the time she hired him.

The Witness: I had to hire him to make them up, didn't I?

Q. (By Mr. Marcussen): You stated, as I recall, that you hired him for the purpose of making monthly audits of your books. Did you testify to that? [118]

A. I told you that Mr. Bosserman made up all my sales tax papers, all my withholding papers, and any kind of tax papers that had to be made up, whether they were monthly or not.

Q. When did he begin doing that?

A. When he first made the income tax of '42.

The Court: Early in 1943?

The Witness: '43, yes, sir.

(Testimony of Catherine O'Connor.)

Q. (By Mr. Marcussen): Did you ever engage him to audit your books and records for the purpose of preparing financial statements showing how much you made each year?

A. He never said anything about that.

Q. I am asking you whether you said anything about it?

A. I didn't know enough to say anything about it.

Q. Do you recall ever engaging him for the purpose of auditing your books and really getting your books and records straightened out?

A. When he had my books, I thought everything was being taken care of.

Mr. Marcussen: I think the record will show what happened, your Honor.

After these taxable years were over, she then engaged Mr. Bosserman for the purpose of making a complete audit. [119]

Mr. Crittenden: That was Mr. Bosserman's statement to avoid responsibility. Let's argue the facts of the case.

The Court: Let's get to the examination of this witness. If you have any more questions, why, ask them and let the witness answer them, and then if there is any question on other matters, why, we will depend on what the record shows.

Mr. Crittenden: While we are still at it, I renew my first objection. Counsel must, in the course of cross examination, be calling upon some of the matters he discussed with my client in my absence.

(Testimony of Catherine O'Connor.)

What they might be, I am not in position to state.

Mr. Marcussen: Your statements aren't testimony. Would you like to examine her?

Redirect Examination

Q. (By Mr. Crittenden): Do you remember when you went up to the Collector's office and do you remember who sat there at the time?

A. May I start from the first and tell about it?

Q. Who was sitting there? Will you point him out?

A. Mr. Sorrell and Mr. Krause and Mr. Tormey.

Q. Was this man there?

A. And Marcussen, yes.

Q. Was anybody else there?

A. I don't know whether you were there the first time [120] or not, Mr. Marcussen.

Mr. Marcussen: Would you tell the witness the date?

Q. (By Mr. Crittenden): What date was it?

A. It was in April, around about the middle of April, I think.

Q. About April 3, wasn't it, to be exact?

A. For dates I don't remember. I am not going to be pinned down for dates, because I don't remember, but this is what took place. Mr. McLaughlin, a former Internal Revenue man and a friend of Bill Jost, my ex-husband, called on me and asked me if I didn't want to go up just as an informal chat, to talk to Mr. Sorrell, that there wouldn't be another soul, and just us three, sitting there talk-

(Testimony of Catherine O'Connor.)

ing informally. He said, "You don't need to tell your attorney about it.

Mr. Marcussen: I object to the statement and ask that her answer be confined to the questions so it may be presented in an orderly procedure.

Q. (By Mr. Crittenden): What happened?

A. When we walked in there, Mr. Sorrell and Mr.—no, you weren't there, Mr. Marcussen. It was a big, heavy-set man. [121]

Mr. Marcussen: Mr. Lauder?

The Witness: Mr. Lauder.

Mr. Marcussen: Do you remember that name?

The Witness: Yes, sir, and Mr. Krause and Mr. Tormey came in later. He wasn't there right when we got there.

Mr. Marcussen: How much later? Do you remember?

The Witness: Within 10 or 15 minutes.

Q. (By Mr. Crittenden): What was said?

A. And I was kind of startled to think so many men would be there, because I was told there was going to be nobody but Mr. Sorrell.

Mr. Marcussen: I object to this as hearsay, what she was told and what her conclusions were and how many men were there. The record speaks for itself. I urge that this be presented by question and answer.

The Witness: I am just trying to tell——

The Court: What transpired at the meeting?

The Witness: Just a general talk of the previous trial, and Mr. Sorrell made the statement that he

(Testimony of Catherine O'Connor.)

knew that, as far as you folks were concerned, there was no fraud. You didn't feel there was fraud attached to it.

Q. (By Mr. Crittenden): Did they ask you any questions about fraud, what you did? [122]

A. I don't know, in the course of the talk, just how it was brought up, but Mr. Sorrell, he did say that.

Q. What did you say? Did they ask you any questions about the fraud? Did they ask you what you did?

A. Well, if there was an intent on my part and all that stuff.

Q. Did they ask you what you did?

A. If I willfully withheld. We were talking about the whole trial in general, yes.

Q. Did they ask you how the return was made out?

A. Yes, and I told them I relied on Mr. Bosserman.

Q. Did they ask you about how much money you had made?

A. I couldn't say, Mr. Crittenden, about that. Our talk up there primarily was just to talk to Mr. Sorrell and not to make an offer. We never made no offer.

Q. I am not talking about that. Did they ask you how much money you had, and what you did with the money?

A. I think the whole case was reviewed.

Q. How long were you up there?

(Testimony of Catherine O'Connor.)

A. Two hours, and we had to talk about something.

Mr. Crittenden: Well, your Honor, is it necessary to go through any more? They talked two hours on the merits of the case. I think that is a showing in this case that counsel will have to draw upon matters that he learned from my client in that time, which was unlawful and contrary to the [123] rules of this Court and illegally obtained.

The Witness: They asked me if Mr. Crittenden knew about it and I said "No," that I came up there——

Mr. Crittenden: I don't think evidence illegally obtained can be used in this Court.

The Court: Are you objecting to something?

Mr. Crittenden: I am renewing the objection that counsel is drawing upon evidence illegally obtained, for the purpose of examining this witness.

The Court: And you take this as a showing of that?

The objection is overruled. Let's get along with the case.

Now, if counsel will just pay a little attention to me here now—in these matters, we have Exhibit 5, as I recall it, and Exhibit 5 is the record in the second trial, and a part of Exhibit 5 is not only the parts, not only the transcript, various parts of that, but the exhibits in that, now some of them, they are segregated in groups and envelopes. We took them as they were offered, and if you gentlemen, in using them, don't use the utmost care in

(Testimony of Catherine O'Connor.)

pulling them out and seeing that they get back into the containers where they belong, then it is going to be awfully difficult for this Court to know where they belong, because I have to depend on you to see that they are there. [124]

* * * * *

Recross Examination

Q. (By Mr. Marcussen): Mrs. O'Connor, I am going to hand you a statement consisting of 13 pages, and it is entitled, "Statement of Catherine O'Connor," and the heading shows that it was taken on February 8, 1946, and I recall your attention to the last page thereof, and ask you whether or not that is your signature there.

A. Yes, that is my signature.

Q. And then I call your attention to the fact that there appears the initials "CO'C."

A. Mr. Tormey had me write that in there.

Q. That is a transcript of the conference you had, in part, at——

A. The conference I had, Mr. Marcussen, I know it is that and I signed for it and everything. I was so nervous.

Q. Your counsel will bring that out for you.

Mr. Crittenden: I think she has a right to answer the question.

The Court: He didn't ask her that. She has answered the question now. If you want to ask her questions when you have redirect, that is all right.

Mr. Marcussen: If your Honor please, this is a statement, a sworn statement, of the taxpayer,

(Testimony of Catherine O'Connor.)

sworn to before Paul Tormey, a Special Agent of the Bureau of Internal Revenue, and it contains certain admissions against interest, and also certain self-serving declarations.

We are particularly interested in those that refer to the amount of her inventory at the beginning of the period in July 1942, and the inventory at the end of the period December 31, 1944.

There is evidence in the record showing that working papers were handed to her at that inventory and were submitted to her for her consideration and for the consideration of her attorney, and that that took place some time previous and that she brought those papers and stated that they were a correct statement of what they purported to be, subject to certain changes that were indicated by her counsel at the time.

I would like to offer this as Respondent's exhibit next in order, subject to an opportunity for counsel to look at it. He is now looking at another similar statement which I will be prepared to offer presently.

The Witness: Your Honor, may I say something?

The Court: No. We have to proceed by question and answer method of trial. If we don't, we would never have an orderly trial. That is one of the reasons we have lawyers. [126]

Mr. Marcussen: I should say, if your Honor please, that copies of this statement, and also the statement that counsel is now looking at, were given

(Testimony of Catherine O'Connor.)

to the taxpayer and an opportunity afforded her counsel at that time to examine them.

The Court: Who was her counsel?

Mr. Marcussen: Her counsel was Mr. Heyman.

The Court: What is the date of that?

Mr. Marcussen: February 8, 1946, executed and subscribed and sworn to on the 21st day of February, 1946.

The Court: Now, as I understand it, these are statements that were made back in 1946 on a certain date.

Mr. Marcussen: And I think the other in December, 1945, if your Honor please.

The Court: And you are proposing to offer them in evidence?

Mr. Marcussen: Yes.

Mr. Crittenden: I will state this: If I have seen these, it has completely passed my recollection, and there are a lot of things here that I didn't have any idea the government had in a statement. They had certain statements in evidence. I thought that was what counsel was referring to. Now I see we have another one here.

The Court: What do you want to do about it?

Mr. Crittenden: There are 29 pages; I would like to finish it. [127]

Mr. Marcussen: The second statement that will be offered here, and which Mr. Crittenden is now reading, is a statement taken from the taxpayer, that one prior to Exhibit 33 of Exhibit 5 that is offered in evidence. That was the first statement

(Testimony of Catherine O'Connor.)

that I am now offering, this Exhibit 33, is a statement in which, among other things, she wished to make corrections.

The Court: What part is this to play in your further examination?

Mr. Marcussen: Just identify them and then not examine any further, just identify them and offer them in evidence.

Mr. Crittenden: He can do that and then let me read this. It won't hold the Court up.

Mr. Marcussen: That is quite all right.

Mr. Crittenden: I want you to realize that I haven't finished reading this.

The Court: I am interested in giving you the time, but I am just wondering if we could find a better time.

Mr. Crittenden: I appreciate your Honor's suggestion. We only read the things that were offered in evidence.

Mr. Crittenden: This was offered in evidence. I have been through this one.

The Court: There is one you have had her identify, and have called her attention to the initials, and let's get [128] it marked.

Mr. Marcussen: I offer as Respondent's exhibit next in order——

Mr. Crittenden: Are those your signature and initials?

The Witness: Yes.

The Court: Is there any objection?

(Testimony of Catherine O'Connor.)

Mr. Crittenden: No objection, subject to reading it, of course.

Q. (By Mr. Marcussen): Now, I hand you a second statement, Mrs. O'Connor, and it consists of 29 pages, and it bears the heading, "Statement made by Mrs. O'Connor in the office of the Intelligence Unit," and then is dated November 1, 1945, and I call your attention to Page 29 of that statement and ask you if that is your signature there?

A. Yes, sir.

Q. And whether or not you swore to the truth of those statements on December 7?

A. I didn't swear to nothing. I just put my name down there for them.

Q. Was this statement sworn to by you before Mr. Krause at the Intelligence Office?

A. I don't remember doing any swearing to any statement. Told me to write my name. [129]

Q. He told you to?

A. Put it in front of me and told me to write my name.

Q. You felt constrained to write your name? Did you do it voluntarily?

A. I did it voluntarily; you know, Mr. Marcussen, I was so excited.

Q. Your counsel will interrogate you about your excitement. I am not interested in that at the present time. I want to know whether or not you signed it. Did you understand what you signed?

A. I understood this was questions and things they were putting to me.

(Testimony of Catherine O'Connor.)

Q. And those are your answers?

A. My attorney tried to make an amended report and they wouldn't let him.

Q. Are those the answers to the statement that you made on that date? That is a question and answer statement, isn't it?

A. These are the questions. I don't know whether those are my answers or not until I read them, but that is my name.

Q. Then you say that is your name?

A. Yes.

The Court: Do those pages that have your signature, are they initialled likewise? [130]

Mr. Marcussen: No, they do not bear the initials.

Q. (By Mr. Marcussen): Now, I will ask you to read the last paragraph on Page 29, under which your signature appears. Just read it to yourself and familiarize yourself with it.

A. I never read that.

Q. Just read it first.

A. I have read it, yes.

Q. And you never read that? That statement?

A. No, sir, I never read nothing, after they got it typewritten up.

Q. Did you sign this in the presence of your counsel, Mr. Heyman? A. I think so.

Mr. Marcussen: I offer this as Exhibit next in order.

The Court: Is there any objection?

Mr. Crittenden: I would like to read it.

(Testimony of Catherine O'Connor.)

The Court: You want to withhold admission until you have read it?

Mr. Crittenden: She says it is her name, and your Honor will admit that in evidence.

The Court: I will mark it for identification.

Mr. Crittenden: If you will mark it for identification, I will have a chance to look at it. [131]

The Court: F for identification.

(The document referred to was marked for identification as Respondent's Exhibit F.)

Mr. Marcussen: Would you like to do the same with respect to the other exhibit?

Mr. Crittenden: It would probably be just as well.

The Court: The other one is already in, so I am going to leave it there, subject to any motion you might make at the conclusion of the trial, but this one will be for identification.

Q. (By Mr. Marcussen): I think you testified that Mr. Jost sold the liquor that you alleged that he stole from your tavern for \$2,000.

A. I said there were 13 cases of whisky taken. I didn't say I seen him steal it.

Q. That isn't my question. I will speak a little louder. I think you testified that Mr. Jost sold—

A. Oh, sold, yes. I thought you said "stole."

Q. —13 cases of liquor for \$2,000.

A. That was a report.

Mr. Marcussen: I move that that be stricken from the record on the ground it is incompetent, as hearsay.

(Testimony of Catherine O'Connor.)

The Court: Well, I am going to let the record stand because, if I sift it one time or another, why, it doesn't really make a lot of difference. I heard it for what [132] it was, namely, she said that was a report. [133]

* * * * *

Mr. Marcussen: Now, Mrs. O'Connor, I think you testified that Mr. McLaughlin was a friend of your husband? A. Yes, sir.

Q. Is he a friend of yours?

A. Not so much.

Q. Is he a friend at all? Do you consider him your friend? A. No, I don't think so.

Q. What is your relationship to him? [134]

A. Nothing.

Q. Were you enticed into that conference at the Bureau of Internal Revenue?

A. I thought—I considered it an enticement.

Q. By whom?

A. I explained before how Mr. McLaughlin kept coming down and telling me if I would come up with him to Mr. Sorrell, with Mr. McLaughlin to Mr. Sorrell's office.

Q. (By the Court): Who is Mr. McLaughlin?

A. A former Internal Revenue man. He is a bookkeeper now.

Q. Now, did you know him?

A. He is Mr. Jost's friend.

Q. Does he come into your place?

A. Yes, sir.

Q. Is he a customer?

(Testimony of Catherine O'Connor.)

A. When Mr. Jost is there, yes, sir.

Q. (By Mr. Marcussen): Has he ever come in there when Mr. Jost wasn't there?

A. He came in several times lately with his friends.

Q. How long has this enticement been going on?

A. I don't know whether you figure it an enticement or not. I am just telling you the facts.

Q. Are you still being enticed? [135]

A. I don't like the word "enticed."

Q. We don't like it either. I am glad to hear you say that.

A. I mean the thought of him—I don't know if he had any dealings with any of the rest of the men on that score.

Q. You don't know anything about that?

A. Well, you are asking me my opinion.

Q. I am not asking your opinion. I am asking whether anybody at that conference, outside of Mr. McLaughlin, enticed you into the conference room.

A. Mr. McLaughlin suggested, and before he suggested he had contacted someone for me to come up there.

Q. He did that before?

A. And told me he was all ready for me to come up.

Q. You didn't ask him to present your case up at the Bureau of Internal Revenue?

A. No, sir. We talked it over several times, but he said he would see what he could do for me by his former association with the Internal Revenue

(Testimony of Catherine O'Connor.)

men, perhaps. Maybe his knowing how to proceed in things would give me a hand, but it would only be in an informal way. It wouldn't be nothing official, and there would be nobody there but Mr. Sorrell.

Q. He proposed that? Is that correct? He promised that?

A. He told me that. I don't know whether you consider [136] it a promise. That is what he told me, told me I didn't need to tell my attorney.

Q. Did he represent you there at that conference?

A. He was supposed to represent me. He brought out a paper just in this way, Mr. Marcussen—he brought out a paper and wanted me to sign a power of attorney which meant nothing, as far as my attorney there. In other words, he told me it was necessary, for him to even talk, just to sit and talk, that it was the understanding I got.

Q. Power of attorney, is that correct?

A. Just to sit and talk, not to make any promises or any compromises, just so he be allowed to sit in. He said he didn't have a green card, or whatever you call it.

Q. Did you sign that statement there?

A. I signed it up there in Mr. Sorrell's office.

Q. Has Mr. McLaughlin continued to represent you in this case?

A. No, sir. I told Mr. Crittenden about it right

(Testimony of Catherine O'Connor.)

away. I at no time dispensed with Mr. Crittenden's service.

Q. You made that statement to whom?

A. A written statement.

Q. Did you tell any representative at that conference that you wanted Mr. Crittenden to continue representing you? A. Yes, sir.

Q. Now, getting back to Mr. McLaughlin—has he [137] continued to represent you in any capacity, with respect to your liability for taxes for these years that are now before the Court?

A. Only just to come up to talk to you, not to talk to you, but to talk to Mr. Boland.

The Court: Who is Mr. Boland?

The Witness: Mr. Boland is in the McAllister Building. I don't know what he represents.

Q. (By Mr. Marcussen): You don't know what he represents? A. No.

Q. You don't know that he is in the office of the Bureau of Internal Revenue?

A. I certainly do.

Q. Then you don't mean to say that you don't know who he represents?

A. I know he represents the government, but I don't know what department.

Q. Do you know he is connected with the Bureau of Internal Revenue?

A. I certainly know that.

Q. What was the purpose of your conversation with Mr. Boland?

A. I didn't talk to him at all. I didn't go with

(Testimony of Catherine O'Connor.)

Mr. Marcussen. I went with Mr. Crittenden. [138]

Q. You didn't appear with Mr. McLaughlin?

A. No, sir.

Q. How many times did Mr. McLaughlin appear there on your behalf?

A. I don't know that.

Q. Did you engage him to do that?

A. No, sir.

Q. You didn't engage him?

A. No, sir. He only done it as a friendly gesture for Bill, Mr. Jost.

Q. For Mr. Jost? A. Yes.

Q. You have been divorced from him for several years?

A. Yes. However, we are keeping company again.

Q. Now, did you at any time in the course of the conference of the Technical Staff, on April 3, 1950, make a statement to the people present that you were very much dissatisfied with Mr. Crittenden and with his services, and that you wished to dispense with his services in this case?

A. No, I did not.

Q. I am asking you if you made any further statement to the effect. A. The thing——

Q. Just a moment. I am asking you a question. I will ask you whether you made any further statement to the effect [139] that Mr. Crittenden was continually asking you for fees, to the effect that you didn't see how he could possibly get you off in this case, and that you would wind up with the

(Testimony of Catherine O'Connor.)

liability to pay, as well as the attorney's fees, and that you were therefore there for the purpose of settling your case and seeing if it couldn't be settled out of court? A. I did not.

Q. You never made that statement?

A. The only thing I said, I wished if it was possible, that Mr. Crittenden could get with you men and try to get a settlement, so I wouldn't have to go back in court, and I said I was going to tell him about it.

Q. Do you recall that I was there at that conference?

A. I can't remember you being there.

Q. Do you remember anybody getting up and leaving?

A. Mr. Tormey left and said he was going to see somebody.

Q. You are certain it wasn't I?

A. No. I thought it was Mr. Tormey.

Q. And you do not recall, do you, that I left the conference before any discussions with you were had about your tax liability?

A. I don't remember your being there.

Q. You don't recall my stating that, before we talk with you, I wished to check with my superior?

A. I don't recall.

Q. You don't recall my coming back?

A. I thought Mr. Tormey went out. I knew some man went out, but I thought it was Mr. Tormey.

Q. Did that individual make any statement?

(Testimony of Catherine O'Connor.)

Do you recall any statement made when he returned?

A. Something was said, but I don't recall what it was.

Q. Would it refresh your recollection that the statement was made by me at the conference that I had consulted with my superior, and that my superior had stated that it would be quite all right to discuss the thing with you, your income tax liability, and that it was the policy of the Bureau of Internal Revenue to afford every taxpayer an opportunity to be heard, and that we would not insist that you bring counsel in with you, who was representing you before the Tax Court?

A. I don't recall that at all. I don't remember nothing like that. The only thing I remember was saying that I wished Crittenden and you men could get together and see if you couldn't come to some settlement so I wouldn't have to go back into court.

Q. Do you remember the document you signed revoking all previous power of attorney?

A. That was done by Mr. McLaughlin, telling me in order to sit in the thing to talk alone with Mr. Sorrell, and [141] I signed that paper, giving him the right to sit in on my behalf to see only if we could give Mr. Crittenden a hand, not to get rid of him by any means.

Q. You thought Mr. Crittenden needed that aid?

A. Mr. McLaughlin gave me the idea that he had something in common with you people that

(Testimony of Catherine O'Connor.)

perhaps he could help Mr. Crittenden by something in a little private conference.

Q. Do you recall whether anything was said by you at that conference as to whether or not Mr. McLaughlin would be recognized as your representative? A. For the day only.

Q. For the day?

A. Just to sit in, that was my opinion, not to take over.

Q. Not to take over?

A. No, sir, because Mr. McLaughlin will tell you that he advised me the minute we got out to get in touch with Mr. Crittenden right away.

Q. Never mind what he told you afterwards. Just answer my questions.

You then were there representing yourself, is that correct?

A. I was, informally. I was given an idea that there would be no one there but Mr. McLaughlin, Mr. Sorrell and myself, just to talk. [142]

Q. You asked us, notwithstanding the fact that we said we could not formally recognize him under the circumstances—You asked that he be permitted to remain in the conference. Is that correct?

A. He told me coming down——

Q. I am not interested in what he told you coming down. I wish you would answer the question.

A. The only reason I gave him power of attorney——

The Court: Will you read the question?

(Question read.)

(Testimony of Catherine O'Connor.)

The Witness: No, I never asked him for him to remain in the conference. This paper was shown to me to sign for him as a power of attorney, so he could sit in and listen and talk in my behalf.

Q. (By Mr. Marcussen): What was your purpose in signing that?

A. Only just to be able to sit in and talk only, not to make any offer or nothing.

Q. Now, were certain documents handed to you, showing a computation of your net worth statement, and also of your income at that conference?

A. The whole trial—you had papers all over the table.

Q. I asked you whether certain documents were handed to you and given to you to take away from this conference. That [143] is what I mean. Do you remember that?

A. I don't remember. I don't remember anything about that.

The Court: In other words, you don't remember that any papers were given to you to be taken away?

The Witness: Mr. Tormey went along with Mr. McLaughlin and I up to the Internal Revenue Office to give Mr. McLaughlin a certain paper. My thought, what I was doing, was to work in conjunction with Mr. Crittenden to see if there could be brought up a difference in the amount derived from you folks and with Mr. McLaughlin, and Mr. McLaughlin said he found a lot of errors.

Q. (By Mr. Marcussen): Never mind. Your counsel will bring out errors in due time.

(Testimony of Catherine O'Connor.)

Do you recall that Mr. McLaughlin asked to see your income tax returns for the taxable years here?

A. I don't remember that, no, sir.

Q. Do you remember that any documents——

A. I don't know that he ever seen them.

Q. Just a moment, please. Just answer the questions. Your counsel will take care of that on redirect examination.

Do you recall that any documents were handed to Mr. McLaughlin for his examination at the conference?

A. No, I don't remember that. [144]

Q. You don't remember that? You don't remember, then, whether those documents were handed to you with a specific request, asking you whether you wished Mr. McLaughlin to see them, and you gave your assent to that? You don't remember that?

A. No. The only thing I remember was this in regard to papers. Mr. McLaughlin asked to see certain papers, and Mr. Tormey said he would turn it over to him if he would go up to the Internal Revenue Office Building, which we did, and the paper was turned over to Mr. McLaughlin.

The Court: That was after the conference?

The Witness: Yes, sir.

Q. (By Mr. Marcussen): Now, do you recall whether or not any discussion was had about your ability to pay the tax liability that has been assessed against you?

A. I told you, Mr. Marcussen, there, and I tell you again, that I have no money, and there was

(Testimony of Catherine O'Connor.)

never no offer made. We were talking in round figures. There was no compromise made.

Q. You didn't state, then,—

A. To my recollection you said something about the government wanting \$20,000, or something like that, and Mr. McLaughlin said, "I guess you wouldn't settle for \$10,000," but for me to have any money, I have no money. I am in debt [145] up to my neck.

Q. You said you had no money at the conference?

A. And I still have none.

Q. And that took a considerable portion of the time?

A. We were there two hours.

Q. Was it explained that we were not concerned with what money you had? Our duty was to determine your liability?

A. I don't know what you said up there about the liability. I was disappointed when we walked in, because I had no idea there were going to be four or five men throwing questions at me. I thought we were going to have a little chat with Mr. Sorrell.

Q. Questions were thrown at you?

A. Yes, but what they were now I can't remember. The whole trial was gone over.

Q. Did you feel you were being coerced in that conference?

A. No, sir, but you went over the same things over again, and I told you I didn't have any money, and the only thing I was up there for was to see if

(Testimony of Catherine O'Connor.)

Mr. McLaughlin could do some good to help Mr. Crittenden to try to come to a compromise.

Q. That is not responsive to my question. You don't recall your being informed at that conference by Mr. Sorrell that it was not our province to consider your ability to pay. It was our duty to consider the tax liability involved in this [146] case?

A. I don't remember Mr. Sorrell saying that to me.

Q. Do you remember whether or not Mr. McLaughlin asked you whether you wished to make an offer of settlement in the case?

A. Mr. McLaughlin didn't never ask me that.

Q. You don't recall his statement to you, "Do you want to offer \$10,000"?

A. No, Mr. McLaughlin will tell you, Mr. Marcussen, that we never offered——

Q. Just answer my question. A. No.

Q. That wasn't said?

A. As for a formal offer, we weren't there to make a formal offer. We were only there to talk, as I understood it.

Q. To help Mr. Crittenden?

A. That is for sure.

Q. Now, you don't recall, I take it then, that Mr. Sorrell told you that \$10,000 would not be regarded as an acceptable offer for settlement of this case?

A. All you gentlemen were talking in thousands of dollars.

Q. You don't recall? A. No.

(Testimony of Catherine O'Connor.)

Q. Do you recall his stating that \$10,000 would not be [147] an acceptable offer?

A. No, sir, I don't, because you were all talking.

The Court: You say you don't remember. All right.

Q. (By Mr. Marcussen): Now, I will ask you whether or not you then turned to Mr. Sorrell and made a statement substantially as follows:

"How about \$15,000? Would that do it?"

Do you recall making that statement to Mr. Sorrell?

A. No, sir, I never did say that. I never did say that.

Q. Then you don't recall Mr. Sorrell rejecting that offer?

A. No, sir, there was no rejection.

The Court: She wouldn't recall it if she said she didn't remember it.

The Witness: There was nothing like that said, your Honor.

The Court: All right.

Q. (By Mr. Marcussen): Is it your testimony, or is it not, that you were enticed into that conference by any representative of the Bureau of Internal Revenue?

A. I will say like I said before that the fact of Mr. McLaughlin being a former Internal Revenue man and considering him a friend of Mr. Jost, that we went up there primarily [148] to just talk, sit down and talk, as far as anyone enticing—with a rope around my neck, and dragging me up there, no.

(Testimony of Catherine O'Connor.)

The Court: Let me ask you this question, because if I follow you, you went up there because Mr. Jost and Mr. McLaughlin came and talked to you and you went up there at Mr. McLaughlin's suggestion?

The Witness: Yes.

Q. (By the Court): And so far as any of your answers that I have heard so far, it was your testimony that your trip up there was at Mr. McLaughlin's suggestion?

A. Yes, sir, he had already made the appointment with Mr. Sorrell.

Q. You didn't have any invitation from anyone else than Mr. McLaughlin? A. No, sir.

Q. (By Mr. Marcussen): Do you recall Mr. Sorrell's stating to you that it would hardly be feasible for the representatives of the Bureau to discuss your liability with you, in view of the fact that Mr. McLaughlin was unfamiliar with the issues in the case?

A. No, I don't believe I remember that, Mr. Marcussen.

Mr. Marcussen: That is all. [149]

* * * * *

Redirect Examination

Q. (By Mr. Crittenden): Mrs. O'Connor, I notice in here on February 8, 1946, at the time that Mr. Tormey, Mr. Krause, and Mr. Heyman were with you, did you go to the Bureau?

A. With Mr. Heyman, yes.

(Testimony of Catherine O'Connor.)

Q. To the Intelligence Unit's Office on McAllister Street? A. Yes.

Q. Do you remember an inventory they talked about as of the close of 1944?

A. Yes, sir.

Q. Did you give them a piece of paper at that time in your handwriting?

A. I made up an inventory right then, and give it to them. I mean I gave it to them out of my head. I was confused. I should never do a thing like that, because I didn't know what I was writing.

Q. Now, there are questions of rents here. Did you make up a rent statement for them and go over a list of rentals at that time?

A. They asked me about the rentals from 2710 Baker Street, and I told them the rentals applied back to the attorney until the apartment house was paid over.

Q. Did you make up a schedule of rentals, and how much you got on each one of the locations?

A. Yes, I think that the place was leased, it was \$20 a month.

Q. Did you put down the OPA schedule, or what you actually collected?

A. No, the OPA and then I had to refund some money back from the OPA.

Q. Now, was there any time in 1942 or 1943 as to these rentals above the bar, that you had any trouble collecting the rent?

A. Yes, because they set fire to the place in the back and I had to have them evicted. There were

(Testimony of Catherine O'Connor.)

Mexican people there, and they left an iron on and set fire.

Q. I don't want to know about that. I was just asking about the rentals. Was there any time that you didn't collect the rents in the OPA schedule?

A. Yes.

Q. Did you put that in the schedule that you gave the [151] men on the eighth day of February, 1946?

A. I forget.

Mr. Marcussen: Are you referring to schedules set forth in Exhibit E?

Mr. Crittenden: They are mentioned in the exhibit, and I am referring to those.

The Witness: Those apartments upstairs, half the time they were vacant, and when they were rented, they were just \$20 a month. One was \$18 and the other \$20.

Q. (By Mr. Crittenden): Did you show the vacancy at the time you made up the schedule in 1946?

A. No, sir. I don't think so. I don't think I did.

Q. They refer here to statement of discrepancy which you had a previous opportunity to examine. Did you take a copy of that home with you, or Mr. Heyman?

A. No.

The Court: No what?

The Witness: I didn't take them home.

Q. (By Mr. Crittenden): When you examined them, was it this date previous to the statement?

A. I never examined that at all, after they

(Testimony of Catherine O'Connor.)

typed it up there. I never read it back. I just signed it.

Q. Now, there is a statement of discrepancy, Larsen-Jost, [152] 1942 statement. Do you remember any kind of a paper like that?

A. The answer is no, I don't.

Q. Did they have a big sheet where they said you made a mistake in reporting income, that you initialled and signed?

A. I don't remember. I don't remember it.

Q. Now, here is the start of the inventory of 1942. Did you give them any figure?

A. Not that I can recall.

Q. Now, I would like to go back to 1942. On or about November 1, 1942, the Alcohol Tax Unit, in connection with the investigation of your floor tax return, made an inventory of liquor or merchandise on hand at the time, and arrived at a gallonage of 257.51; by the same method explained to you in connection with the inventory, you submitted on January 1, 1945, we have arrived at the money value of \$3,541.68.

Are you willing to accept this figure as representing, to the best of your knowledge, the inventory value on that date? And you answered, "Yes, sir."

Do you remember any such thing being said and answered?

A. I don't remember a thing like that.

Q. Now, you must have had something you were selling as of the first day of November?

(Testimony of Catherine O'Connor.)

A. There wasn't too much stock. What date was that? [153]

Q. November 1, 1942. You and Bill Jost had been married a little over six months, and you had had the bar about four months?

A. We had stock on hand. I don't know what the inventory was, what it would arrive at, but that was the time when it was hard to get whisky.

Q. Do you know what method they used in arriving at any value of 257.51? A. No.

Q. Was anything discussed about arriving at an inventory of 257.51 proof gallons?

The Court: That is a statement of gallons?

Mr. Crittenden: Then converted to dollars on some conversion basis, and I am trying to find out what it was.

Now, the next question:

"Now, Mrs. O'Conner"—

A. May I say something?

Q. Go ahead.

A. If anything was arrived at as a total, perhaps it was the beer and everything included in there, because if there was an inventory made it would have to be the whole totals down.

Q. Did you agree to a sum of \$3,541?

A. Not to my knowledge.

Q. Did they use any particular conversion figure between [154] proof gallons and dollars?

A. I don't know how they arrived at that.

Q. Was there any particular dollar sum when you were up there? A. No.

(Testimony of Catherine O'Connor.)

The Court: Well, those questions and answers——

Mr. Crittenden: These are questions and answers and I am trying to find out.

Now, Mrs. O'Connor, in the absence of a December 31, 1942, inventory which your previous testimony reveals was never taken, it is necessary to use the figures just mentioned, \$3,541.68, representing the December 31 inventory. Is this approximately correct, in your estimation?

"A. Yes, sir."

Q. Do you remember any such testimony as that? A. No, I don't.

Q. Did you make any guesses in inventory?

A. That is all I did, guess at questions and everything else.

Q. What were your guesses?

A. I was trying to tell them, to the best of my ability, but I was so excited, I really don't know.

Q. Did you guess something? You must have given them some figure. Now, what was the figure?

A. I can't remember, Mr. Crittenden.

The Court: I don't think you are going to get anywhere.

The Witness: I mean this is all foreign to me.

The Court: She very obviously is not going to be able to remember offhand now figures that very plainly she gave or didn't give back there at the time. All of her answers are that she doesn't remember.

Q. (By Mr. Crittenden): Does any of this bring back any recollection of what happened there?

(Testimony of Catherine O'Connor.)

Have you read this through during recess?

A. Yes, I did.

Q. At my suggestion? A. Yes.

Q. Did it bring back any recollection at all?

A. Not a bit. It was all such a conglomerated affair. I didn't know what I was saying.

Q. Now, there is a statement here where Mr. Krause is asking you,

"Mrs. O'Connor, referring back to the \$1,500 loss shown on your books, April, 1944, property investment, is that correct?

"A. That is right.

"Q. Is it not a fact that you did not pay any money whatever on that investment? [156]

"A. No, I didn't, Mr. Krause.

"Q. Why did you show it on your books?

"A. I don't know why I put it down, only to show that I was giving it to Heyman to sell for my mother."

The Witness: That is right.

Q. (By Mr. Crittenden): Do you remember that? A. I remember that.

Q. You remember the properties discussed?

A. Yes, sir. It was for Mr. Heyman to sell it for my mother.

Q. Then it goes on:

"Q. What is the closest approximation you can make, and I am taking in the beer and everything else, of the stock that was set down?

"A. Mr. Gragan never kept the stock on hand. We used out of the one bottle.

(Testimony of Catherine O'Connor.)

"Q. Was the inventory higher than when you bought the Divers' interest in July, 1942?

"A. Yes, a little more. Mr. Divers let me do all the buying."

And then it says further on,

"Q. What would be the best estimate, or the closest you could come on the beginning of January, 1942?

A. It ran \$750 and \$1,000. It wasn't a great deal." [157]

Q. Do you remember such testimony?

A. It couldn't have been any more than that, if it was that much.

The Court: Let me ask you a question: I heard the question read there and an answer which came along about "We used out of one bottle." What do you mean?

The Witness: It was hard for Mr. Gragan to get stock.

The Court: Who was he?

The Witness: My partner at the time, your Honor, and he would only buy a case at a time.

The Court: What do you mean "used out of one bottle"?

The Witness: Just set up one bottle for use to use, one called Bourbon and one Bar Whisky and one called Gin and one Bar Gin. In other words, we didn't have a big assortment of stuff.

Q. (By Mr. Crittenden): You poured it out of the bottle in which it was brought into some bottle labeled——

(Testimony of Catherine O'Connor.)

A. No, poured it out of the same bottle. I mean by that, we used the same bottle on the shelf. I didn't open any bottles unless he opened them first, and he would give me a bottle. We had a separate shift, and he would give me a bottle. We didn't have no big assortment. That is what I am [158] trying to tell you. We didn't have an assortment of bourbon, one or two called bourbon and one bar whisky.

Q. If someone said he wanted bourbon?

A. Always pour it from the bar whisky.

Q. Whatever was open at the bar?

A. That is what I would pour.

Q. What you mean is that you didn't have a selection? If someone would come in and say, "I want Old Forrester." A. No, we didn't.

Q. You just sold bourbon?

A. Yes, that is right, and the same with beer.

Q. (By Mr. Crittenden): You say this is your writing? A. That is right.

Q. And these initials are by you?

A. Yes, Mr. Tormey asked me to do that.

Q. Were there any changes in any of these when you signed them? I don't see any corrections. Did you go through and correct it?

A. I just signed every one of those pages. He told me to sign them.

Q. Are there any mistakes in here?

A. I never read them.

Mr. Marcussen: That was Government's Exhibit E, wasn't it? [159]

(Testimony of Catherine O'Connor.)

Q. (By Mr. Crittenden): Now, do you remember a conference that you went to, and your husband, O'Connor, went and Mr. Krause and Mr. Moore?

A. I don't know who all was there, but I know that Mr. O'Connor went with me.

Q. You didn't have any lawyer at that time?

A. No, that was it. I didn't know anything about it. They just told both of us to come up there.

Q. Did you look through this to read it?

A. I never got a chance to look through to see it until he went back up there, and he had me sign it.

The Court: It probably hadn't been transcribed.

Q. (By Mr. Marcussen): You say on the 7th day of December, did you read it through and correct it before you signed? A. No.

Q. Didn't you know what you were signing?

A. The government men, I figured they give us the promise that there was nothing to it, that Mr. Heyman wanted to make an amended report.

Q. I mean: Didn't you read this through?

A. No, sir.

Q. Now, you have read that paragraph. You certified you carefully read that. Did you read that at the time you [160] signed that?

A. No, I didn't. I never read all this over, at all.

Q. Now, the second time you went in there——

A. This was the first time.

Q. December 7?

The Court: When?

(Testimony of Catherine O'Connor.)

Mr. Crittenden: 1945.

The Court: Now, is that when you say you didn't have an attorney or did you have?

The Witness: My husband, Mr. O'Connor, went there with me the first time and the second time Mr. Heyman went.

Q. (By Mr. Crittenden): Now, you see here Mr. Alvin Larsen, Mr. William Yost. Who is Yost?

A. That is a misprint.

Q. Did you correct it?

A. I didn't read it, I tell you. It isn't Yost. It is Jost.

Q. You used that as your married name?

A. J-o-s-t, not Y-o-s-t. They never asked me to read it, though.

Q. Now, the time you went down there, the first time, which was November 1, was everything that you said at the meeting written down?

A. On November 1, you mean? [161]

Q. Did they have a court reporter, a stenographer there?

A. Some little lady in there, yes.

Q. Did they start right out asking you what your name was? Did they ask you to raise your right hand right away?

A. I can't recall that.

Q. Did you raise your right hand?

A. I don't know if I did or not. I can't recall that.

Q. Did they ask you that—did they tell you that under the Constitution you have the right to

(Testimony of Catherine O'Connor.)

refuse to answer any questions which were asked, which you believed might incriminate you? Did they suggest that? A. I don't remember.

The Court: You don't remember? All right.

The Witness: I don't remember.

Q. (By Mr. Crittenden): Did they say they could use this against you?

A. I don't recall them saying it. I am telling you I don't recall them saying that.

The Court: Do you mean by that they didn't say it, or you just don't recall it?

The Witness: I don't recall it.

Q. (By Mr. Crittenden): Then I will read further:

"Q. Then it would be 1940 and 1941 returns that [162] Burt Morgan prepared?

"A. Yes, Morgan.

"Q. And 1943 and 1944 were prepared by Bosserman? "A. That is right.

'Q. And where did the information come from, shown in those returns?"

Mr. Marcussen: What is the purpose of reading this?

Mr. Crittenden: Well, I thought it was sort of jointly and there was nothing underhanded about it.

"Q. Mr. Morgan did not keep them correctly?

"A. No, I didn't say that. I said that we made notations.

"Q. You say that he recorded \$20 a day to the Board of Equalization?

(Testimony of Catherine O'Connor.)

"A. No, we had an accountant who came in. I don't know what his name is now."

Q. Do you remember anything like that?

A. Yes, I do.

Q. I am trying to refresh your recollection.

A. I don't remember them asking me this stuff.

Q. Do you remember that you had an accountant before Bosserman?

A. I don't remember their asking me, but your reading this back to me—we had Burt Morgan.

Q. I mean, when they did ask you, did they ask you [163] about Burt Morgan? Did Mr. Krause ask you?

A. I think they asked me who compiled the income taxes before Bosserman took over, because they went back to the time——

Q. Do you remember them asking you questions about how the books were kept?

A. No, sir; no.

Q. Do you remember their asking about what basis you——

A. I remember them asking me questions as to how I acquired my interest up there with Mr. Gragan.

Q. Did they ask you how Mr. Gragan and you kept the books?

A. I don't remember that.

Q. Would you say they did or they didn't?

A. I don't remember them doing it.

Q. Do you remember a lengthy examination up

(Testimony of Catherine O'Connor.)

there, the first time you went up, with Mr. O'Connor?

A. They all seemed lengthy to me, every time they got me up there.

Q. Did they ask you if anybody threatened you or coerced you when you were up there, to make your answers? A. I don't recall.

Q. Well, now, there is your signature here above Mr. Krause's? A. Yes, sir. [164]

Q. You say you didn't read this or correct it?

A. He told me, he said, "This is your testimony. Sign here," and I did.

Mr. Crittenden: This is Exhibit F for identification.

The Court: Are you through now?

Recross Examination

Q. (By Mr. Marcussen): And you testified you don't remember reading this at all and never made any corrections to the statement made?

A. I don't remember, Mr. Marcussen. I told you that.

Q. Did you testify that you didn't remember? Is it your testimony that you don't remember making them or that you didn't?

A. I did not read that through.

Q. You did not read that through, and did not correct it?

A. I don't remember correcting it.

Q. You did not correct the spelling of the name Yost? A. No, sir, I did not.

(Testimony of Catherine O'Connor.)

Q. I hand you Exhibit 33, which was a part of the exhibit in the criminal case in the second trial, which is part of Exhibit 5 in this case.

Mr. Crittenden: It is in evidence, counsel.

Q. (By Mr. Marcussen): And ask you whether that is your signature? [165]

Mr. Crittenden: We will stipulate it is.

Q. (By Mr. Marcussen): Now, I call your attention to the fact that the question appearing at the foot of the first page:

"Q. Mrs. O'Connor, we are referring here today to a sworn statement that you previously submitted to this department on November 1, 1945, a copy of which I believe you have before you.

"A. Yes, sir.

"Q. Do you now wish to amend some of the answers and statements made in that statement?

"A. Yes, I do, please.

"Q. Throughout that statement there is the name Maddock. Should the spelling be Mattick?

"A. Yes, sir.

"Q. And also throughout that statement, where the name Yost is mentioned, should the name be Jost?

"A. Yes, sir.

The Witness: I don't remember that.

Q. (By Mr. Marcussen): Do you say that did not occur?

A. I didn't say it didn't occur. I say I don't remember it. I don't remember your going back over those names.

Mr. Marcussen: That is all. [166]

HENRY SORRELL

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): Will you state your occupation, Mr. Sorrell?

A. Technical Adviser, Technical Staff, Pacific Division.

Q. Briefly, what are your duties?

A. Conferring with taxpayers or their counsel, or both, with a view of settling cases to avoid litigation.

Q. And have you been here this afternoon and listened to the testimony of Mrs. O'Connor?

A. I have.

Q. You heard it all, did you? A. I did.

Q. I am directing your attention particularly to her testimony concerning the conference which occurred at the Technical Staff's Office on April 3, 1950. You were present at that conference, were you? A. I was.

Q. Do you recall all that went on at that conference?

A. Well, fairly well, although I made a memorandum of [167] it very shortly after the conference.

Q. Have you read that memorandum recently?

A. I have.

Q. Does it contain all of the substance of what occurred at that conference?

(Testimony of Henry Sorrell.)

A. I would say practically all of it.

Q. Does it contain any reference to the statements made by Mrs. O'Connor concerning her reason for being at that conference?

A. Yes.

Q. And do you recall whether or not you said anything about her dissatisfaction with the service of Mr. Crittenden?

A. Yes, she said she was dissatisfied with the service and didn't want him to represent her any further.

Q. Do you recall whether Mr. Krause was present at that conference?

A. He was not.

Q. Do you recall whether I was present at that conference?

A. You were.

Q. Do you recall whether I left the conference some time after it had been under way?

A. You left the conference shortly after it was under way.

Q. And do you recall what I said when I left that [168] conference?

A. Yes, you said you wanted to consult with your superior in the office as to the propriety of conducting this conference with Mrs. O'Connor.

Q. And then did I return to that conference shortly thereafter?

A. Possibly ten minutes later.

Q. And did I make a statement then as to whether or not we would confer with Mrs. O'Connor?

A. You did.

Q. And what did I say about that, at the time?

(Testimony of Henry Sorrell.)

A. In substance, that you had been informed that it was a Bureau policy to give the taxpayers an opportunity to come into the Bureau and discuss their case, and that it was perfectly all right for us to come and talk to Mrs. O'Connor.

Q. Will you state, please, what was the substance—state, please, what Mrs. O'Connor said was the purpose of her being there?

A. She said she was there for the purpose of trying to settle her case. She had been through two court trials and didn't want to go through another one.

Q. Did she say anything about her own ideas of the prospect of success in this trial?

A. She said that she was informed about the offer that Mr. Crittenden had made. I think it was about \$1,600. My [169] recollection is that she said it was a perfectly ridiculous amount, in view of the fact that she had been tried in two court trials and had been convicted and sentenced and served time, and she was prepared to make a substantial offer of the settlement.

Preliminary to the offer of settlement, did she make any statement about her financial position?

A. Yes, she said she was practically broke. That was the substance of her statement; as a matter of fact, in the course of the conversation, she dictated to Mr. McLaughlin, who was sitting at the end of the table, a statement of her assets and liabilities and he made notations on an envelope.

Q. Was there any discussion at all concerning

(Testimony of Henry Sorrell.)

the law or the merits of this case at this conference?

A. Only one reference to the law and that the burden of proof was for them to show that the Commissioner was wrong. That was as far as it went.

Q. With respect to the deficiency?

A. That is correct.

Q. Did you also state to her that the burden of proof was on the government to prove the fraud?

A. Absolutely.

Q. And outside of that, was there any discussion as to the actual merits of this case?

A. No, after Mrs. O'Connor had talked about her [170] financial condition, and that was discussed, I would say, at a greater part of the conference, I suggested that possibly she and Mr. McLaughlin had better talk the situation over. I said, "We had better let you look this schedule over." He had a schedule of assets and liabilities and net worth, and she said she would like to have that done, so I asked her if it was agreeable for us to let Mr. McLaughlin look over this statement of assets and liabilities and he said it was, and I handed it to Mr. McLaughlin and he looked it over for a while and then he said he would like to get a copy of it, so that he and Mrs. O'Connor could go over the matter at leisure.

Q. Do you recall whether there was also handed her a copy of income, income statement, for the

(Testimony of Henry Sorrell.)

taxable years involved here in connection with that net worth statement?

A. Oh, yes, there was.

Q. And that was shown to her and to Mr. McLaughlin?

A. Shown to her before it was shown to Mr. McLaughlin, because we were not taking any chances.

The Court: What do you mean?

The Witness: Because Mr. McLaughlin was not entitled to practice before the Bureau of Internal Revenue and we told him he could come in with her and sit in the room but could not appear as an advocate.

Q. (By Mr. Marcussen): And was there any discussion had about that statement? [171]

A. I don't believe there was any discussion, because Mr. McLaughlin didn't understand it and wanted an opportunity to look it over.

Q. Do you know whether or not the taxpayer requested you to show to Mr. McLaughlin her income tax for the years involved?

A. Mr. McLaughlin said he would like to see the returns, and I took each return in itself and showed it to Mrs. O'Connor and asked if it was her return, if it was her signature on the return, and she said it was. I asked her if it was agreeable to her that Mr. McLaughlin looked the return over, and I handed it to Mr. McLaughlin, as I did for each of the returns for the years '42 to '44 inclusive.

(Testimony of Henry Sorrell.)

Q. Was there any discussion about that return at the time? A. Very little, if any.

Q. And I think you stated there was very little, if any, discussion, about the net worth statement?

A. That is correct.

Q. And outside of whatever discussion was had with respect to those two items and the discussion about the burden of proof as to the deficiency being upon Mrs. O'Connor, and that the burden of proof was on the government with respect to fraud, was there any discussion about the law in this case?

A. No. [172]

Q. By anybody at the conference?

A. No, and I was there at the time of the entire conference.

Q. Will you state how it was that this conference came about?

A. Well, it was on the afternoon of March 30, this year, 1950, I was called by Mr. McLaughlin and I had never met nor heard of the man before, who represented himself to be a friend of Mrs. O'Connor's and said that he wished to come down to see me and talk the tax case over, and I said, "Mrs. O'Connor is represented by Mr. Crittenden. How about him?"

He said, "Mrs. O'Connor doesn't wish Mr. Crittenden to represent her any more. She is very much dissatisfied with him and she wants me to come down and represent her."

So I said, "Well, we couldn't do that unless there is a power of attorney submitted," and he said, "I

(Testimony of Henry Sorrell.)

will get a power of attorney from her," and I said, "Any power of attorney will have to revoke any previous representation, because we will not deal with two attorneys." So he said that would be done and then he called—let me see.

Q. Do you have a memorandum there?

A. Yes, written shortly after what transpired.

The Court: Written by you?

The Witness: Dictated by me to my secretary and then, after talking with Mr. McLaughlin, I talked to Mr. Lauder, [173] who is my immediate superior, head of the local office, in the Technical Staff, and told him what had transpired, and he said, "Find out whether McLaughlin has been admitted to practice before the Bureau," and so the 30th was on Thursday, and the next morning, on a Friday, the 31st, I think it was shortly after 11 o'clock, McLaughlin called again and said he had discussed the matter with Mrs. O'Connor and she would execute a power of attorney, authorizing him to represent her, and so then I asked him if he was empowered to practice in the Treasury Department, entitled to practice before the Tax Court, and he said, "No," and I said we couldn't accept his representation, but if he would come with Mrs. O'Connor she could be present in a conference and we would discuss with him anything she wanted to discuss with us, so then I think I arranged a conference for that afternoon at 2 o'clock. That is right. And about 15 minutes later, he called me back and said Mrs. O'Connor was doing a lot of cooking there

(Testimony of Henry Sorrell.)

by herself and wasn't able to have anyone to take her place, so we made an appointment for the following Monday, April 3, at 10 o'clock.

Q. Now, I will ask you whether or not Mrs. O'Connor thereupon made an offer of settlement of \$10,000?

A. During the course of the conference, after talking about her financial condition, etc., Mrs. O'Connor talked to Mr. McLaughlin and there was an offer of \$10,000 made. [174]

Q. Do you recall whether or not Mr. McLaughlin turned to her and said, "How about it, Kay? Do you want to make an offer of \$10,000?"

A. She did, that is correct.

Q. Do you recall what her answer to that was?

A. She said yes, she had been through two trials and she wanted to get rid of this case.

Q. What did you say about the acceptability of the offer?

A. I told her it was unacceptable.

Q. Do you recall what she said after that?

A. Let me see if I have a note.

Q. If you can't recall, will you refresh your recollection from that memorandum?

A. After turning that down, they said, "How about \$15,000? Would that do it?" or something like that.

Q. And did you reject that offer?

A. Yes.

Q. Now, by the way, how did it come about, what was the occasion for making the memorandum?

(Testimony of Henry Sorrell.)

Ordinarily do you make a memorandum?

A. I generally make a memorandum of a conference that I have, and the reason I made this one was because on the afternoon of the 3rd, I will have to preface this, lead up to it,—on the 29th of March I initialled a letter, advising Mr. Crittenden that we were turning down the first offer he [175] made of around \$1,600, and of course I had no knowledge of when the letter was mailed. I understand it was mailed on the 30th.

The Court: That is, the 30th of March, this year?

The Witness: Yes, sir, so that when Mr. McLaughlin called me, I assumed that he was calling in response to the receipt of that letter, because we sent a copy to Mrs. O'Connor. So on the 3rd, or the afternoon of the 3rd, after Mrs. O'Connor and Mr. McLaughlin had left with Mr. Tormey to get a copy of this schedule that was being given to them, why, Mr. Crittenden called me and asked about the discussion and said he received a letter and he wished to see if there was some way, whether the staff representative had a figure in mind that would be acceptable.

I informed him that Mrs. O'Connor had visited this office that morning for the purpose of discussing a settlement of her case, so he appeared to be very angry and made quite an ugly remark over the telephone.

Q. What did he say to you on the telephone?

A. The first thing he said was, "I am a sad son of a so and so," and I never heard—

(Testimony of Henry Sorrell.)

Q. Did he say "so and so"?

A. He said "son-of-a-bitch."

Mr. Crittenden: I will stipulate I said it.

The Witness: That is what he said exactly. [176]

Q. (By Mr. Marcussen): Go on.

A. I told him that Mrs. O'Connor had the right to come down to our office personally to talk over a tax case and that, since she had informed us at the conference that she didn't want Crittenden to represent her, we felt at liberty to talk to her and Mr. McLaughlin who accompanied her, and she had also presented at the conference a power of attorney signed by her; as a matter of fact, signed in the conference, it had been prepared before coming there by Mr. McLaughlin, and that power of attorney revoked all previous powers of attorney.

Q. Do you have that with you here?

A. The power of attorney? I have not. I imagine it is in the general files in the office.

Q. Will you make an effort to find it and bring it to court? A. Yes.

Mr. Marcussen: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Crittenden): Now, I will show you here my office copy of a letter of March 9, and ask if that is the letter you are referring to in which I made the offer.

A. I would say so. I am not going to read it entirely. [177] I would say it is a copy of it.

(Testimony of Henry Sorrell.)

Mr. Crittenden: There is no objection to using the copy, is there?

Mr. Marcussen: No objection, subject to check for inaccuracies.

The Court: It will be marked in evidence as Exhibit 13.

(The letter referred to was marked and received in evidence as Petitioner's Exhibit No. 13.)

Q. (By Mr. Crittenden): Now, Mr. Sorrell, you knew I was licensed to practice before the Board of Tax Appeals?

A. We wouldn't have recognized you if you hadn't been.

Q. And I appeared in cases before the war, before it became the Tax Court, when it was the Board of Tax Appeals?

A. One case, yes.

Q. And you knew that prior to this I had represented Mrs. O'Connor and she had come with me to a conference in your office, and Mr. Marcussen was present?

A. That is correct, yes.

Q. And we had discussed a compromise settlement at that time, hadn't we?

A. I don't know what you mean by a compromise—a possible settlement.

Q. You also knew that Mr. Tormey and I were on such [178] terms that when I held out my hand to Mr. Tormey he wouldn't even shake hands with me. You knew that. You knew the background of what happened in the District Court case?

(Testimony of Henry Sorrell.)

A. I don't know the background, but I know what happened in the office.

Q. Did you tell Mr. Tormey that Mrs. O'Connor was coming up there on April 3rd?

A. Did I tell him about it? He was present.

Q. How did he know to come there that day?

A. Called him to arrange for him to attend the conference.

Q. You told Mr. McLaughlin you were going to have him there?

A. I did not. I didn't feel it was any of McLaughlin's business if he was present.

Q. Did I ask you on the telephone as to the conference on the afternoon of the 3rd what transpired at that meeting?

A. You certainly did.

Q. What was the answer?

A. I told you I wouldn't tell you.

Q. You were present in a conference about the 19th day of April. Do you remember that conference?

A. I remember a conference. The exact date I don't know.

Q. It is right here in the letter, April 19, at 10:00 [179] a.m. in case there is any question, I will let you look at Mr. Neblett's letter.

A. That is right.

Q. Do you remember at that time I asked you what took place at the conference?

A. That is right.

Q. And I wasn't told, was I?

(Testimony of Henry Sorrell.)

A. I don't believe you were.

Q. Now, Mr. Lauder hadn't been in this conference before, had he, any time I was there?

A. No, he had not, that is correct.

Q. Is it customary for him to attend when an unlicensed person is present, but when a licensed——

A. I call Mr. Lauder in when I feel there is need of it.

Q. You felt it was necessary to share responsibility?

A. No, I felt he should be in there because it was somewhat unusual.

Q. And you felt that with Mr. McLaughlin and without my presence, it would need somebody like Mr. Lauder to protect the government's interest, but when I was just alone, there wasn't any necessity of that precaution?

A. No, that was not the reason. It was rather an unusual conference, requested by the taxpayer, and I felt his presence was necessary.

The Court: Which conference was this? [180]

The Witness: The one Mrs. O'Connor attended.

The Court: She attended? You mean the one——

The Witness: The one that she came to our office with Mr. McLaughlin.

Q. (By Mr. Crittenden): At the time of that conference, you discussed the question of whether or not there was fraud?

A. We did not.

(Testimony of Henry Sorrell.)

Q. And you discussed how much was the liability?

A. We told her what the liability was, but we never discussed the merits of the case.

Q. Didn't you ask her about what money she had received and what she had handled?

A. We did not.

Q. In all the two hours' talk nothing was mentioned as to the merits of the case?

A. The only time the merits of the case were discussed was when we got to discussing that particular schedule which was presented to Mrs. O'Connor and then shown to Mr. McLaughlin.

Q. Now, that schedule, is that the same one that you gave me in that black and white photostat?

A. I think it is, yes.

Q. It is in the exhibits here.

The Court: Exhibit 6. [181]

The Clerk: 10, if your Honor please.

Q. (By Mr. Crittenden): I show you and ask you if this isn't the same thing.

A. I would say so, yes.

Q. And that is what you were discussing, the factual matter that makes this up?

A. Positively not. We didn't discuss it.

Q. You discussed the figures?

A. We did not. They asked to have a copy presented to them to discuss at their leisure. It was not discussed at the conference.

Q. In all the two hours, the only thing discussed was the things you have just outlined?

(Testimony of Henry Sorrell.)

A. And a lot of it was about you, about she didn't want you to represent her any longer, how you were asking for money all the time, and most of it was on the question of inability to pay.

Q. Now, Mr. Sorrell, how long have you been on the technical staff?

A. 12 years; in the federal service, about 30.

Q. And you are familiar with the rules of practice?

A. I am.

Q. I am going to show you the rules of practice, Rule 24, Subdivision 3 (b). I want to ask you if you know this rule about the withdrawal of counsel? [182]

A. Yes, I do.

Q. And you did at that time on April 3, 1950?

A. I did not.

Q. When did you learn that rule?

A. I have known that rule ever since I have been on the staff.

Q. Then you did know it at that time?

A. Oh, yes, I knew the rule.

Q. You knew I had no power of attorney on file with your department in this case, didn't you?

A. I knew you were representing the taxpayer before the Tax Court.

Q. And I had no, what you call, "power of attorney"?

A. I didn't know.

Q. It is not in the file, is it?

A. I don't know.

Q. You knew what file you were handling?

A. You are an attorney of record in the case.

Q. You don't need a power of attorney?

(Testimony of Henry Sorrell.)

A. That is correct.

Q. And you knew that I could withdraw only upon order of this Court, didn't you? I could do that only——

A. As far as I know, Mrs. O'Connor is the one that removed you.

Q. You are familiar with the rule, aren't you?

A. I am familiar with that.

Q. And you are also familiar with the other rules of the Tax Court, specifically this portion of Rule No. 2, which I am pointing to, starting here with, "Practitioners before this Court carry on their practice"——

A. I do.

Q. And at the time of April 3, were you familiar with that rule?

A. I would say I was.

Q. Are you familiar with any portion of the rule that says it doesn't apply to government counsel?

A. I don't know. I haven't read the entire book.

Q. I mean this particular point that practitioners shall carry on practice in a manner adopted by the American Bar Association.

A. I know of no exception to the rule.

Q. You know what the American Bar Association's rule is as to consulting with opposing litigants, don't you?

A. I couldn't say, because I am not an attorney.

Q. You know that a lawyer can't discuss the merits or go over a case or even discuss the case with the party on the other side, with the consent of the other attorney. You are familiar with that?

(Testimony of Henry Sorrell.)

A. Certainly.

Q. Did you have any idea that Mr. Marcussen had no [184] authority to have any change in these rules made by his immediate superior?

Mr. Marcussen: I object to that as argumentative.

The Court: Objection sustained.

Q. (By Mr. Crittenden): Do you have that memorandum that you made? A. I have.

Q. May I see it? A. Sure.

Q. Do you know the contents in here?

A. Fairly well, yes.

Q. Could you, or did you testify without the assistance of this, or did you need it to assist you?

A. In some instances I did and in some I did not. When I wasn't sure of myself I referred to it.

Q. Did you know at the time you made this that this was correct? At the time you made it did you know it? A. Oh, yes, absolutely.

Mr. Crittenden: I would like to offer this in evidence.

The Court: For what purpose?

Mr. Crittenden: That is what he used to refresh his recollection.

Mr. Marcussen: No objection.

The Court: It will be marked in evidence as [185] Petitioner's Exhibit 14.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 14.)

(Testimony of Henry Sorrell.)

Redirect Examination

Q. (By Mr. Marcussen): Who did the talking for the government in that conference, Mr. Sorrell?

A. I think I did a considerable amount of it.

Q. Who did most of it?

A. Well, I would say you or me, but I think I did most of the talking, because I know I was the one that handled all the returns that were handed to Mrs. O'Connor, and I know when we were talking about her net worth, I questioned her about that, so I would say I did most of the talking in the conference.

Q. Do you know whether I knew anything about the merits of the case at that time that I was in that conference? Do you happen to recall whether I was familiar with the merits of that case at that time?

A. With the merits of the case? I don't believe you knew a whole lot about the merits of the case at that particular time, it is my recollection, because you had made some review of it, but not a whole lot. That is my recollection of that time.

Mr. Marcussen: That is all. [186]

Recross Examination

Q. (By Mr. Crittenden): Mr. Marcussen was present at the prior conference that you and I had and Mrs. O'Connor?

A. Mr. Marcussen was present at the first conference with you and Mrs. O'Connor, and I believe he was present at the conference with you and Mr. Nestell. That is my recollection.

(Testimony of Henry Sorrell.)

Q. We pretty well explored a lot of facts. You presented the government's viewpoint and I presented the taxpayer's at the two prior conferences when Mr. Marcussen was present.

A. You did a lot of talking. Whether you presented any evidence, I don't know. I think you did mostly talking and arguing.

Q. You presented the government's viewpoint, didn't you?

A. Without any question, yes.

Mr. Crittenden: That is all.

The Court: You are excused.

Mr. Marcussen: If your Honor please, at this time I would like to offer in evidence Respondent's Exhibits E and F for identification.

The Clerk: E is in.

The Court: F is marked for identification. Is there any objection? [187]

Mr. Crittenden: No objection. We can take it for what it is worth.

(The document referred to was received in evidence as Respondent's Exhibit F.)

* * * * * [188]

PAUL W. TORMEY

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): What is your occupation? [189]

(Testimony of Paul W. Tormey.)

A. I am a Special Agent in the Intelligence Unit, Bureau of Internal Revenue.

Q. How long have you been occupied in that position? A. Approximately five years.

Q. State very briefly what your duties are in connection with that position?

A. To investigate income tax cases where there is a suggestion of attempt to evade the tax.

The Court: You said you are in the Intelligence Unit?

The Witness: Yes, sir.

Q. (By Mr. Marcussen): Mr. Tormey, I hand you a part of Exhibit No. 5, offered in evidence in this case, which is to say specifically Government's Exhibit 24, which is a part of that exhibit.

* * * * *

Q. (By Mr. Marcussen): Returning that paper to you, which I just identified, Mr. Tormey, I ask you to state what that is.

A. This is a statement headed "Larsen-Jost, 1943 Statement of Discrepancies," and it lists items with the months, dates, and under the explanation, "Entered in check [190] stub or cash book as follows:" It gives the amount and then in the fourth column the distribution such as gambling loss, donation, with question marks after them, and the top of those headings the explanation by taxpayer.

Q. Did you prepare that statement?

A. This is in my handwriting, prepared by me, January 28, 1946, according to the initial in the corner.

(Testimony of Paul W. Tormey.)

Q. What was the purpose of preparing it?

A. In going over the taxpayer's book which is in evidence——

The Court: The black book you are talking about?

The Witness: Yes, sir, the items such as "Policeman, check entered, Harry Shannon, policeman, USO"—the repetition of items was confusing to us to know whether they were expense items or purchases or something similar, so we, on the basis of what information we could find in the book, made this preliminary distribution, gave this tax schedule to the taxpayer with the request that she go over it with her attorney and, at a later conference, be prepared to give us either approval of our tentative distribution of these items or corrections thereto, and you will notice that on many of the items there is a red line drawn through it and the item is transferred to a different column.

Q. Who drew the red lines?

A. I drew the red lines, at the conference on February [191] 8, 1946, in our office, attended by the taxpayer, her attorney, Mr. Heyman, and also attended by Mr. Krause and myself.

Q. Did you redistribute those items to the appropriate columns? A. That is right.

Q. There is certainly other writing appearing much later than the rest of it, and in a much finer hand. Whose writing is that?

A. Mr. Heyman was at this conference. That is his writing.

(Testimony of Paul W. Tormey.)

Q. I hand you another statement bearing the heading, "Larsen-Jost, 1943 Statement of Discrepancies, Purchase of 2710 Baker Street" and, up at the top, it bears the initials "PWT", and the date 1/25/46, and ask you whether that is part of that statement.

A. Yes, sir, it was originally prepared at about the same time as the page that we have just been talking about.

Q. Was it submitted?

A. And submitted to the taxpayer at the same time.

Q. To Mrs. O'Connor and her attorney?

A. That is correct.

Q. And it was discussed at this conference and such handwriting you will see is in Mr. Heyman's. He admitted at the conference that he had put that in in response to our [192] request for an explanation, and it should have been kept attached to this exhibit and offered in the Federal Court. That is my recollection of it, and I imagine that is the purpose of examination.

Q. Then the statement is not complete without that additional sheet which you have just handed me?

A. The statement, in so far as it goes, is complete; because these are small items of cash or check, disbursements that appear in the cash book, and these discrepancies are confusing items we ran into in connection with her purchase of 2710 Baker Street, her payment of Mr. Heyman partly in cash

(Testimony of Paul W. Tormey.)

and partly by the collection of rents that he managed for her, and also this matter of the Lachman check about which there has been testimony.

The Court: This last is on the second sheet?

The Witness: Yes, it is really a supplement to the first sheet.

Q. (By Mr. Marcussen): Now, is the statement, as prepared by you correct, as corrected by the notations on there, put on there by Mr. Heyman?

A. Yes, that is correct, and these were done in the presence of the taxpayer and Mr. Heyman, the attorney, at this conference of February 8, and it is so referred to in the sworn statement that was given. [193]

Mr. Crittenden: If you want to stipulate that the statement of discrepancies go in, I will so stipulate. I am sure we will be here more than two hours.

Mr. Marcussen: You have no objection?

Mr. Crittenden: No objection, in fact, we need it for explanation.

Mr. Marcussen: Upon counsel's stipulation, I would like to offer that in evidence. I don't know whether the procedure would be to offer it as the government's next exhibit in order or whether it is a part of Exhibit 5.

The Court: It will come in as your next exhibit, but you can let the record show that it is a continuation or supplement to a paper that is already in evidence as part of a record in one of the trials.

The Clerk: That will be G.

(Testimony of Paul W. Tormey.)

The document referred to was marked and received in evidence as Respondent's Exhibit G.)

* * * * * [194]

HENRY SORRELL

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was further examined and testified as follows:

Redirect Examination

Q. (By Mr. Marcussen): Mr. Sorrell, have you produced a power of attorney which was signed in your presence at the conference of April 3 in the office of the Technical Staff?

Mr. Crittenden: If you will state that it was signed, I will consent to its going in the record.

Mr. Marcussen: And that is your power of attorney that you mailed to us thereafter?

Mr. Crittenden: Yes, I will stipulate that is the one I mailed with that letter.

Mr. Marcussen: This is referred to in your letter to the Technical Staff.

Mr. Crittenden: That is right. You will state this is a copy of the letter that was sent. I turned that over to Mr. Nestell.

Mr. Marcussen: Subject to correction for inaccuracies, I would like to offer in evidence at this time as Respondent's Exhibit next in order a power of attorney signed by Catherine O'Connor in favor of Raymond K. McLaughlin.

The Clerk: Exhibit H.

(Testimony of Henry Sorrell.)

Mr. Crittenden: There is a misunderstanding. I [198] think I put the original in.

The Court: Exhibit H in evidence.

(The document referred to was marked and received in evidence as Respondent's Exhibit H.)

Mr. Marcussen: And as Respondent's Exhibit next in order a power of attorney executed on April 3, 1950, in favor of Mr. Crittenden.

The Court: Exhibit I in evidence.

(The document referred to was marked and received in evidence as Respondent's Exhibit I.)

Q. (By Mr. Marcussen): I hand you Petitioner's Exhibit 2 and ask you whether or not that is Mr. Neblett's signature on that letter.

A. It is. As a matter of fact, I saw him sign it.

Q. Now, I will ask you whether or not, prior to the conference of April 3, 1950, you had ever seen Mr. McLaughlin or knew of him before that date?

A. I never heard of him prior to March. I never saw him before April 3.

Mr. Marcussen: That is all. Thank you.

Recross Examination

Q. (By Mr. Crittenden): Mr. Sorrell, isn't it customary, under the practice of the Treasury, to notify an attorney who is representing a taxpayer, when some other power of attorney is tendered by [199] the same taxpayer?

(Testimony of Henry Sorrell.)

A. I don't know whether it is customary or not.

Q. It is always done in your office, isn't it?

A. I couldn't answer that question, because I don't have anything to do with that. I generally take powers of attorney and submit the power of attorney to a clerk who handles those things, so what is done I couldn't answer.

Mr. Crittenden: That is all.

* * * * *

PAUL W. TORMEY

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was further examined and testified as follows:

Direct Examination—(Continued) [200]

* * * * *

Mr. Marcussen: If your Honor please, at this time I will offer in evidence Respondent's Exhibits J, K, L, M and N.

The Court: Is there any objection?

Mr. Crittenden: No. I want the record to show that Exhibits K and L are the small photostats in their original form.

* * * * *

Mr. Marcussen: Let the record show that Exhibit M consists of three separate statements.

Mr. Crittenden: Mr. Tormey's computations?

Mr. Marcussen: Yes.

(The documents referred to were [202] marked and received in evidence as Respondent's Exhibits J, K, L, M, and N.)

(Testimony of Paul W. Tormey.)

Q. (By Mr. Marcussen): Mr. Tormey, do you have in your possession a computation showing the rents received by Mrs. O'Connor during the taxable years on the Baker Street property?

A. Yes, sir.

Q. Now, will you describe briefly what the content of that schedule is, consisting of two pages?

A. The first page is restricted to the year 1943 and the second page to the year 1944, and this schedule recites the purchase, the acquisition of 2710 Baker Street, the liability incurred, subsequent payment thereon by the taxpayer, the rentals collected during 1943 by her attorney, Mr. Heyman, as her agent, and applied by him in the net amount after the expenses of the apartment operation for any one month had been paid to the principal of the mortgage which he held. [203]

* * * * *

Mr. Marcussen: I think they should be identified.

The Witness: So the summary of the statement which appears on its face is the total capital on taxpayer's liability, the total income received, the total expense allowed against that income. Well, that is all.

Q. (By Mr. Marcussen): Now, is the material that is presented on that included in statements which have been prepared by you on Respondent's Exhibits J, K, and L? A. That is correct.

Q. That material was used in the preparation of those three? A. That is right.

(Testimony of Paul W. Tormey.)

Q. And those three statements were prepared by you? A. Yes, sir.

Q. Will you state what is the source of material that you used in compiling this information on this two-page spread which we have been talking about?

A. As to the year 1943 which is Page 1, it is based principally upon a statement furnished the Intelligence Unit by Mr. Maurice Heyman, the attorney for the taxpayer, in which he makes a month-by-month running report of the rents collected, the expenses paid, and the balance applied to the contract, and, in addition, he cites the interest charges accruing on the balance, and acknowledges any direct payments of cash [204] which the taxpayer may have given him.

In most instances where direct payments of cash occur, they were covered by the taxpayer's check and therefore appear in their books, but, in some cases, she applied cash, some of which is on her normal business book records, some of which is not. Therefore, this is a fundamental support of the 2710 Baker Street property submitted by the taxpayer.

Q. Now, speaking again about this second group of papers submitted to you by Mr. Heyman, will you tell how they came into your possession, whether or not they came into your possession at the request of the Intelligence Unit.

A. As I recall it, they were turned over to me by Mr. Krause as part of the papers that had been acquired by the unit at the time I took over the

(Testimony of Paul W. Tormey.)

case, but, as I understand from reading the summation, they were submitted voluntarily by Mr. Heyman. It was his own idea that they be given to us.

Q. Do you have a further explanation to make with respect to the year 1944, covering the schedule?

A. The same general details as described in the year 1943 appear on Page 2 for the year 1944; however, the taxpayer completed payment on the mortgage on the property by August 15, 1944, and thereafter collected the rents directly, and disbursed the expenses in connection with the apartment house directly, and, in some instances, these are recorded in [205] her books, the black book that we have in evidence, and in some instances they are not, but her checks cover these, some of these expenses, and in some cases they do not.

Q. So that on Page 2, covering the year 1944 on this schedule of rentals, to the extent that they are not covered by information submitted by Mr. Heyman, they are covered by information obtained from the records of the taxpayer, either books of account or cancelled checks?

A. That is correct.

Mr. Marcussen: I will offer the rent schedule as Respondent's exhibit next in order.

* * * * *

The Court: Is there any objection?

Mr. Crittenden: None.

The Court: Exhibits O and P in evidence.

(Testimony of Paul W. Tormey.)

(The documents referred to were marked and received in evidence as Respondent's Exhibits O and P.)

Q. (By Mr. Marcussen): Now, referring to Exhibits O and P in evidence, do [206] you have a further explanation you wish to make?

A. I would like to suggest that that be identified as operating statement of the Baker Street property, rather than rental statement, because we never had a statement of the gross rent.

Q. We will characterize that in that manner.

Now, I hand you Respondent's Exhibit J and ask you to state briefly what that is and whether you prepared it.

A. Yes, sir, I prepared this schedule in May of 1946, as an Application of Funds Statement. In other words, it reports the application of all money spent by the taxpayer or applied to the acquisition of an asset for the disbursement for a business expense or a personal item, and it also sets forth all identified sources of funds received by the taxpayer, including those reported on her returns, identified "Amount of Rental Income," the income from interest credited to her savings account.

Q. Now, what is the purpose of a statement of source and Application of Funds?

A. It is to show that all moneys known to have been spent by taxpayer in this case have been adequately accounted for, either as reported income or identified as loans or other source.

Q. Do the statements in this case show that all

(Testimony of Paul W. Tormey.)

of the funds were accounted for by this taxpayer?

A. They do not.

Q. Was there an understatement for the year 1942? A. Yes.

Q. In what amount?

A. In the amount of \$7,214.13.

Q. How about 1943?

A. An amount of \$17,030.71.

Q. 1944? A. \$22,596.49.

Q. Now, I would like to have you identify the columns for each year by number which contain the material pertaining to the statement of source and application of funds.

A. Funds applied during 1942 appear in column 2; funds realized, or source of funds, appear in column 3. For the year 1943, funds applied appear in column 5, and funds realized appear in column 6. In 1944, funds applied, column 8; funds realized as column 9.

Q. Now, taking the year 1942, I call your attention to the first item in column 2, which appears to be \$748.55, Bank of America, and ask what is the significance of that item in that column.

A. Correction. Bank of California.

Q. Thank you.

A. And it happens to be the ending balance remaining in the taxpayer's account after allowance for any outstanding [208] checks as of December 31, 1942.

Q. And I will ask you, then, calling your attention to the next item, the Morris Plan Company,

(Testimony of Paul W. Tormey.)

in the amount of \$1109.23, and ask the significance.

A. That is the year-end balance remaining to the taxpayer's credit.

Q. And the next item, \$3041.68, merchandise inventory.

A. That is the year-end merchandise inventory.

Q. Now, the next item is Investment in Tavern.

A. That is the balance of—that is the total funds applied, by my calculations, during the year.

Q. Now, I call your attention to the fact that the actual amount expended in 1942 for the tavern was—I will withdraw the question and ask you whether, in interpreting this statement, there is any other item in column 3 that should be used in connection with that?

A. Yes, sir, under column 3 there is an item of \$1,000, and that is deducted from the investment in tavern, because it represents the inventory value agreed to by the taxpayer as of July, 1942, and consequently affects the computation of income and cannot be carried in the asset account.

Q. Is there another item in the "Funds Realized" column that should be used in connection with the item of Investment in Tavern? [209]

A. Yes, sir. I have an offsetting item of \$650. May I explain how that arose?

Q. I wish you would explain it by way of my questions, Mr. Tormey. I will just ask you the difference between the \$650 appearing in column 3 and the \$2300 appearing in column 2. That is \$1650, is it not?

A. That is correct.

(Testimony of Paul W. Tormey.)

Q. So that the net effect of this would be exactly the same as if \$1,650 had been entered in column 2, instead of the \$2,300 and no item had been entered of \$650 in column 3.

A. That is correct.

Q. Would you explain why you happened to treat that in that manner, instead of putting in the net amount, the amount of \$1650?

A. Yes, I will.

Q. Go ahead.

A. The taxpayer testified and her records show that she paid \$1650 for a one-half interest which had previously been owned by Mr. Victor Divers. She thus became the full owner of the tavern, and my computation reflected that, if one-half interest was worth \$1650 the other half-interest was worth the same, but she had only paid \$1000, so there was an appreciation in investment, and for the purpose of the net worth statement that was shown in the valuation and offset by what you might term a revaluation surplus of \$1650. It is [210] a non-taxable item, and disregarded for income tax purposes.

Q. Now, is the procedure that you followed with respect to that item the one commonly followed where the purpose is to prepare a net worth statement?

A. That is very common in the banking and commercial world, but not common in the Revenue Department, and should not have been handled in that way.

Q. Was the \$650 shown as a credit in Item 3—

(Testimony of Paul W. Tormey.)

was that included as an income item on the deficiency notice for the year 1942?

A. It was not.

Q. Now, then, I call your attention to the next three items appearing in Column 2 entitled "Booths." What is the significance of that item in the "Funds Applied" column?

A. It was a purchase made by the taxpayer in the tavern, which is a depreciable item, not an operating expense, and therefore set up as an asset.

Q. Showing, therefore, that she applied either cash or credit to take care of—to acquire those booths in that year?

A. That is correct.

Q. Now, is your answer the same with respect to the next item of \$1,066.79 entitled "Draperies and furnishings"?

A. Yes, that happens to be the Lachman furniture account, and it is in part represented by cash payment for the [211] purchase of the merchandise and in part by an offsetting liability to Lachman Bros. for contracts entered into before the end of the year.

Q. In fact, in an identical amount in column 3, showing as a liability?

A. That is correct.

Q. And while we are talking about the liability, then, in column 3, what is the significance of that?

A. Credit is given for the purpose of the statement to any increase in the liability.

Q. In other words, it merely shows the acquisition of an asset by means of that credit?

(Testimony of Paul W. Tormey.)

A. That is correct.

Q. Then is your answer the same with respect to "Unidentified Loans" in the amount of \$300 appearing in column 2?

A. Yes, I may explain that "Unidentified Loans" is taken from the taxpayer's records. This item of \$300 appears in her cash book. May I add something to that? After discussion with the taxpayer, a credit appears in the subsequent years to bad debts; in 1943 for \$150; and 1944 for \$150, so that while this asset is set up in the beginning year, it was written off in an orderly fashion on losses never repaid, some of them were being talked about yesterday.

Q. And she was given credit for that?

A. That is correct. [212]

Q. Now, that completes the items in column 2 which are identified as assets, and then there appear certain entries under the title "Liabilities," and I call your attention to the item of \$174, B. T. Brilliant Company, Jewelry, and ask you what is the significance of that item in that column?

A. That is payment of an outstanding liability from the previous year. The record will show she was indebted to the B. T. Brilliant Company in that amount as of December 31, 1941, which was paid off in full during 1942.

Q. The next liability item entered in column 2 under "Funds Applied" is \$203.01 from Lachman Bros., and I ask you what is the significance of that?

(Testimony of Paul W. Tormey.)

A. \$28.01 of it applies on liability similar to the Brillinat one we have just discussed from 1941 and \$175 issued on December 31, 1942 was a down payment of a total contract of \$1,066.79 entered into by the taxpayer at that time, which we just discussed as drapes and furnishings.

Q. Representing a partial payment by the taxpayer to Lachman Bros.?

A. A partial payment, yes.

Q. For the purpose of "Source of Application of Funds Statement," does it make any difference whether the liability paid existed previously or was incurred during the year?

A. No, by way of identification. [213]

Q. Then, is your answer with respect to the next two items, Morris Plan Company and Pacific Finance Company, the same as it was with respect to the previous item?

A. Those are total funds applied, either against pre-existing liabilities or current transactions during the year.

Q. Now, the next item below that appears opposite the title "Net Worth" in the amount of \$10,-945.36.

A. That is the total of all the items in column which we have just discussed which apply to accounts which have been identified as asset account.

Q. Now, beneath that total there appear other items under the general heading, "Income and Expense Items," the first of which is "Net Cost of Goods Sold" in the amount of \$7,051—I beg your

(Testimony of Paul W. Tormey.)

pardon—\$7,518.78. Will you explain the significance of that item?

A. That is the net cost of goods sold as identified. It is arrived at by taking the taxpayer's beginning inventory, adding to it her purchases, deducting the year-end inventory, and that is the net cash applied for cost of goods during the year.

Q. Is the item of \$3,041.68 appearing under "Merchandise Inventory" as the third item in column 2 the ending inventory to which you refer?

A. That is correct.

Q. Then the net effect of the item, the \$7,000 item [214] for net cost of goods sold is to reflect that that is the amount that was spent by the taxpayer during that year, for merchandise, is that correct.

A. That is correct.

Q. That is merchandise actually a deductible item?

A. That is correct.

Q. There follow salaries and wages in the amount of \$1,990; taxes on business \$934.81; rents, repairs, and other expenses, \$917.32, and I ask you to state what that represents?

A. Those are all items of funds applied as you have just identified, and are the totals of such items which appear in the taxpayer's cash book or her checks.

Q. Then, under the heading "Deductions," there are two items, contributions in the amount of \$25.00; interest in the amount of \$73, and I take it those are expenditures representing those items, is that correct?

(Testimony of Paul W. Tormey.)

A. Yes, sir, in the case of the interest it was applied by being included on the credit to the Morris Plan Company. It was not a cash expenditure. It was a debt paid to interest, charged by the Morris Plan Company.

Q. Show me the item of interest that you are referring to.

A. The Morris Plan Company account shows \$73 in interest applied on this loan of the taxpayer during the year.

Q. On this schedule in column 3, does the liability [215] appear to the Morris Plan Company in the amount of \$1,200? Is that what you are referring to?

A. Not a liability in itself. It reflects the receipt of the money on the liability.

Q. Then there follows an item under the general heading, "Personal Account," \$935.98, which is for personal expenditures, and I presume that is what it purports to be.

A. That is right.

Q. And then there is an item of \$167.50 under "Admitted Gambling Losses."

A. Those are the items admitted by the taxpayer in the part referred to yesterday in her examination, that she identified in conferences with the agent as definitely being gambling losses, and they are supported by her own checks or entries to cash in her black book.

Q. They do not include, do they, those gambling losses listed in the books as donations to charity?

A. In part they do, in 1942, yes.

(Testimony of Paul W. Tormey.)

Q. In part they do? A. Yes, sir.

Q. Well, then, is the significance of that item that she has been allowed those gambling losses?

A. No, sir. This is simply a source and application of funds to arrive at any amount.

Q. They were disallowed later? [216]

A. That is correct.

Q. Then the next item is \$2400 appearing there as living cost and that purports to be her own estimate of what she spent for living expenses?

A. That is correct.

Q. Completing the sum total of \$25,907.75. And that, I take it, represents the total amount of money that was applied and spent by the taxpayer during that year, is that correct?

A. It has to be qualified to this extent, that it is the total of money spent or credit applied. The year-end balance, beginning and ending balance, only are taken into consideration, because the other ins and outs are actually applied to the other items appearing on the statement.

Q. Now, we come to column 3. There are a few items that I would like to have you explain their significance. In column 3 the first item of \$863.79, appearing as a credit under Morris Plan Company, and it is on the same line with the corresponding debit in column 2 of \$1,148.23. I believe you testified that the latter figure of \$1100-odd was the ending balance in her Morris Plan account?

A. That is right.

Q. Now, do you take it that the \$863.79 shown

(Testimony of Paul W. Tormey.)

in column 3 shows that \$863.79 of the ending balance of \$1,100-odd is accounted for by the existence of an opening [217] balance in that account of \$863.79?

A. You can deduce that, and that is correct in this instance.

Q. And the next item in column 3 is the \$1,000 item appearing as a credit under "Investment in Tavern"?

A. That represents the transfer of part of her check charged to the tavern to inventory account.

Q. Inventory? In other words, it is based upon her testimony, as I understand it, that she agreed that approximately \$1,000 of the amount of \$1,650 that she expended for the remaining half-interest in 1942 was for a payment of inventory?

A. That is correct.

Q. And was that \$1,000 included in the item which you have testified to on cost of goods sold, in column 2, in the amount of \$7,518.78?

A. That is correct, the first item in that computation, the beginning inventory, \$1,000, then the closing inventory of \$3,041.68, was subtracted and the net amount of goods sold resulted.

Q. Take next the item of \$1,066.79, and I ask you what does that represent?

A. That represents the total credits; in other words, liabilities assumed by the taxpayer for the purchase of materials or carrying charges at Lachman's during the year [218] 1942.

Q. And it was with that credit that she received

(Testimony of Paul W. Tormey.)

assets that are accounted for in column 2, is that correct? A. That is correct.

Q. Will you state what is the next item, \$1,200, appearing under Morris Plan Company loans?

A. That represents cash received in the amount of \$1,200 during the year.

Q. Under the designation "Net Worth" appears a total item, "\$4,130.58, and I ask you whether or not that is the total of all items appearing above that? A. That is correct.

Q. Then under income and expense items there appears an item, "Spouse's salary while married" in the amount of \$965, and I ask you to explain what that is?

A. The taxpayers reported on their joint return as total amount of \$1,380 and in fairness to the taxpayer, only the amount which Mr. Jost was known to have earned during their marriage was set forth in here as identified funds. We considered that it was possible that every penny of that salary of Mr. Jost may have been turned over to acquire these assets or pay these expenses.

Q. When you say, "Every penny," you mean every penny of the difference between \$965 and the total amount earned during the year? [219]

A. No, I mean the \$965 not earned while he was married to the taxpayer. The amount earned while single cannot be applied to the assessment.

Q. Is the \$965 the amount earned while married to the taxpayer? A. While married.

Q. Then, for the purpose of this statement, you

(Testimony of Paul W. Tormey.)

have assumed in her favor that all of her husband's salary was used by her in the business to account for the acquisition of some of the assets and the incurrence of some of the expenses appearing in column 2?

A. Payment of expenses, yes, sir.

Q. Then the next item is, "Income from partnership," \$2,116.05.

A. That is the Victor Divers and Catherine O'Connor partnership, reported by them for the year 1942 and all of it was credited here as having been available to the taxpayer for the acquisition of these assets or for the payment of liability and expenses.

Q. Just a moment. Is that Mrs. O'Connor's one-half? Does that represent the distribution of Mrs. O'Connor's one-half share in the profits of the partnership for so long as it existed in 1942, to July 15, 1942?

A. Yes, it is the amount of partnership income she reported on her own return as having been received during the [220] year.

Q. Then the next two items are items for interest and rent, and I take it that they are merely items of income that have been reflected for those accounts, is that correct?

A. The item of \$22.44 is interest credited by the Morris Plan on Thrift Account which we talked about in the asset section.

The \$363.00 is the net rental income determined for the taxpayer for the year 1942.

(Testimony of Paul W. Tormey.)

Q. Is that after the allowance of the deductions for operating expenses of her own property—property she owned and the property she rented?

A. Yes, it is. That is the theory, but, in this case, the year 1942, the only rents the taxpayer was collecting were on the apartments over her tavern.

Q. I beg your pardon. I will withdraw the question. She didn't own any property during that year.

A. Yes, and expenses on the apartment were commingled with business expenses, if there were any allowed in business deductions, and there are no deductions from gross rents received for the year 1942, as such.

Q. The next item, \$10,506.55, what is that item?

A. That appears on the taxpayer's return, gross business receipts for the year—for the period July 16 to December 31. [221]

Q. In other words, the receipts she admitted receiving?

A. Reported receiving.

Q. Then next is \$650, appreciation on tavern investment, and I think you testified on that already.

Then the next item is unidentified income, \$7,-214.13, and I will ask you what that is?

A. That is the difference between the total of funds applied, which we discussed in column 2 and the total of all other items in column 3, which we have discussed. That is the figure necessary to bring column 3 into balance.

Q. In other words, is it correct to conclude, then, that in order to have made or acquired the

(Testimony of Paul W. Tormey.)

assets, and made the expenditures that are listed here and identified in column 2 as funds applied, she would have to had in her possession either cash or credit in the total amount of \$7,214.13, in addition to the items that we have just identified in column 3? A. That is correct.

Q. Now, then, I don't want to go through all of these items that appear on the funds applied and funds realized columns for the years 1943 and 1944, but I will just ask you whether or not the entry of those items and the computation of the additional cash income which you have computed for those years has been computed on the same basis and in the same manner as you have just testified to with respect to [222] 1942?

A. That is entirely correct.

Q. Now, I wish, however, that you would glance over the year 1943 and ascertain whether there are any particular items that need particular explanation.

A. I notice that you were introducing in evidence the Heyman records which will explain the acquisition of the land and buildings identified as 2710 Baker Street property and the item of \$17,000 which appears in column 5 as a debit.

Q. Now, I refer you to Respondent's Exhibit K which is an income statement which you prepared for the years 1942, '43, and '44, and I will ask you to state generally what the source of the material is from which that statement is prepared.

A. I would like to first state what it sets forth

(Testimony of Paul W. Tormey.)

and then I will give you the source of it. The information on this schedule is based on the return of the taxpayer, the corrections determined by our investigation, and the resultant corrected income or expenses, as the case may be.

Q. Now, when you are talking about corrected items, are you referring to corrections that were identified and agreed upon with the taxpayer or her attorney?

A. In general, those items, if there was any question in our minds as to the propriety or chance, if we felt that the taxpayer should be given an opportunity to explain the circumstances of any item they were explained; other normal [223] errors found in the books and records which we consider technical adjustments were made without advice to the taxpayer. They are minor amounts, however.

Q. Then the items appearing here are based upon an audit of her books and records, and they are also based upon these sworn statements, material received by the taxpayer and submitted to the Intelligence Unit in these sworn statements of her attorney?

A. That is correct.

Q. That is what I am getting at.

Now, I call your attention to the item appearing under the designation "Total Receipts" in column 3 of this statement which is headed "Increases and Decreases," and the item \$7,214.13, and ask you whether that is the difference between the item of \$10,506.55 disclosed by the taxpayer's return and

(Testimony of Paul W. Tormey.)

the total item of \$17,720.68 which you have used as the corrected amount of her gross income.

A. That is correct.

Q. Now, that is the same amount, is it not, that appears as the difference computed on Respondent's Exhibit J for the year 1942?

A. That is correct.

Q. And similarly, you have used for the year 1943 on Respondent's Exhibit K an item of \$17,-821.99, and for the year 1944—I beg your pardon—for the year 1943, that was correct, was it not?

A. That is right.

Q. And for the year 1944, an item of \$22,296.49, and ask you whether those items are the same items appearing on Respondent's Exhibit J for the corresponding years?

A. That is correct.

Q. Now, referring to columns 10, 11 and 12, I will ask you to state briefly what they are.

A. Column 10 sets forth the total of any item on the schedule, either income or expense for all of the years 1942, 1943, and 1944, as disclosed by the taxpayer's return.

Column 11 sets forth the totals corrected by the Bureau and column 12 sets forth the net decrease or increase in any particular item for the entire period.

Q. Referring you to column 12, under the heading "Total Receipts," I will ask you what is the significance then of the item of \$47,632.61.

A. It represents additional business income de-

(Testimony of Paul W. Tormey.)

terminated by our investigation in the amount of \$47,632.61; that is gross receipts only.

Q. Which the taxpayer failed to report?

A. That is correct.

Q. For the three years?

A. That is right.

Q. Now, at the foot of this schedule, you have drawn [225] a double line, and you have a statement, "Adjusted Net Income." May I call your attention to the fact that the adjusted net income—well, I will just ask: What is adjusted net income for each of the three years?

A. In all of the categories?

Q. No, the adjusted net income for each of the three years.

A. The corrected net income is adjusted for the year 1942, which appears in column 2 of this exhibit, amounts to \$10,044.26; for 1943, which appears in column 5, \$21,821.05; for 1944, \$30,571.66.

Q. And will you state, under "Adjusted Net Income" whether or not you have given—what the differences are for each of the three years under the heading "Adjusted Net Income", and let the record show that I am speaking from Exhibit K.

A. For the year 1942, the additional income, which means the difference between the corrected income, \$9,266.97; for the year 1943, \$13,941.77; for the year 1944, \$25,479.68.

Q. And what was the total for the three years?

A. \$48,688.42.

(Testimony of Paul W. Tormey.)

Q. Now, I hand you Respondent's Exhibit L and ask you to state what that is?

A. That is a comparative statement of taxpayer's assets, liabilities and net worth for each of the years involved in this investigation. [226]

Q. What does it show for the increase in net worth for each of the taxable years involved here, and identify the column and line, please.

A. The heading "Net Worth" appears on line 36 of this Exhibit L, and the first year, in column 3 of the schedule for the year 1942, amounts to \$6,164.78. For 1943, that appears in column 6, and the increase in the taxpayer's net worth during that year was \$13,183.91.

The increase during 1944 which is set forth in column 9 amounts to \$15,329.89.

Q. What is the computation showing the total increase in net worth for the period?

A. \$34,678.58.

Q. Now, referring back to government's Exhibit J, I will ask you whether or not, in addition to the various columns showing a statement of source and application of funds, you have opening and ending balances for the various accounts of the taxpayer for each one of the three years.

A. I have, to the extent of assets and liabilities, which result in net worth shown on line 33 of that statement.

Q. Have you computed on that schedule the increases in net worth?

(Testimony of Paul W. Tormey.)

A. They are set forth in 12, for each of the years.

Q. I notice that there is a difference between the increases in net worth, as shown on that statement, Respondent's [227] Exhibit J, and the increases in net worth shown for the respective years 1943, 1944, and also 1942, on Respondent's Exhibit L. Will you state what the difference is?

A. The only difference is the amount of \$650 which, in Exhibit J, has been explained as an overstatement of the taxpayer's assets by recording appreciation under tavern investment, so in each of the years the amount of the increase will be \$650 overstated, and that is the only difference.

Q. That is for income tax purposes?

A. Yes, sir.

Q. And I think you testified that \$650 did not enter into—was not credited or charged to her as income received in that year, and therefore would not increase her actual net worth for the purposes used in this audit.

A. That is correct.

Q. Then the correct net worth figures, to summarize, appear on which one of these two statements?

A. The latter one, Exhibit L.

Q. The lesser amount?

A. That is correct.

Q. Now, I hand you Respondent's Exhibit M and ask you to state what that is?

A. That is in detail a summary of the funds applied by the taxpayer, and the source of those funds and the unexplained differences we have al-

(Testimony of Paul W. Tormey.)

ready described in the schedule. I say [228] that it is a customary because, in some instances, the items appearing on this detailed statement, which is detailed by item, are the total of some of the items appearing.

Q. In other words, this is a summary of the source and application of funds columns appearing on Respondent's Exhibit J?

A. That is correct.

Q. And comes around to the same net figures, but you have got certain subtotals representing groupings of certain items?

A. That is correct.

Q. I would like to have you refer to the deficiency notice in this case.

Now, referring to Respondent's Exhibit L which is the net worth statement, I notice at the foot of the page, you have certain entries under the general heading, "Adjustment to Net Worth Increases."

Well, it is adjustment to net worth increases, and then you have certain items reflecting additions to the net worth, and I ask you to state briefly what those are?

A. Yes, the net worth increases which I have testified to are the actual increases in the taxpayer's net worth, but for income tax purposes there are certain items which are not reflected either in her books or in the net worth statement which must be considered in this case. [229]

They consist, in the year 1942, of recorded personal expenses of \$935.98. The gambling losses we

(Testimony of Paul W. Tormey.)

have already testified to and the living costs we have already testified to in the amount of \$2,400, so that there were a total amount of increases of \$3,503.48 and, in addition, the spouse, Mr. Jost, earned a salary, while single, which was reported on the return and had to be accounted for—not reflected in the taxpayer's cash, but had to be accounted for—an amount of \$415. That is the difference, you recall, between the \$965 used on the application of funds statement and the total amount that appears on the return, of \$1,380; then a non-cash item of appreciation which would not be reflected.

Q. Just a moment. What are the total items then of that character, which you added to the net worth, in an effort to ascertain the net?

A. \$3,918.48.

Q. And did you make certain deductions?

A. Yes, sir.

Q. In the year 1942 what was the deduction?

A. A single one for depreciation in her business expense. It is a non-cash item, not claimed by the taxpayer, but allowed, deducted for depreciation, \$39.00.

Q. What was the depreciation on?

A. Six months on the furniture and fixtures in the [230] tavern which the taxpayer, in subsequent years, identified as costing \$780 and subject to depreciation of 10 per cent.

Q. Resulting in a total added to the net worth

(Testimony of Paul W. Tormey.)

increase of \$3,789.48, and adjusted net income of \$10,044.26.

A. That is correct.

Q. Now, I will ask you whether that is the same amount which is computed on Respondent's Exhibit K as the corrected net income for the year 1942?

A. Yes, it is. It appears on Line 50.

Q. Are the amounts computed, then, for adjusted net income on schedules K and L as adjusted net income of the taxpayer for each of the years involved the same?

A. That is correct.

Q. Now, for the year 1942 you testified that that is \$10,044.26, and I ask you whether that is the same amount shown on the deficiency notice for the year 1942.

A. That is correct. I am looking at it.

Q. And is the amount the same for each—is the adjusted net income computed on those schedules the same as it is on the deficiency notice for the years 1943 and 1944?

A. That is correct, with the exception of the year 1943, you will have to restrict it to income tax net income.

Q. Yes. Now, calling your attention to the year 1942, computation in deficiency notice, specifically to an item, decrease in personal deductions, \$54.50, will you state what [231] that is composed of? Do you have the papers which you need to answer that question? Here is the deficiency notice. I call your attention to the item \$54.50. Can you testify as to

(Testimony of Paul W. Tormey.)

the item of \$54.50 added into income as a result of decrease in deductions claimed on the return?

A. That is correct, the taxpayer's return for the year 1942 claims a deduction for contributions in the amount of \$152.50. The corrected amount of these contributions was determined to be \$25, requiring a disallowance in the amount of \$127.50.

On the other hand, the taxpayer failed to claim a deduction for interest paid to Mr. Heyman, or to Morris Plan—I cannot recall at the moment—in the amount of \$73, which reduced this disallowance to a net amount of \$54.50. That would be Morris Plan interest, because the Heyman contract was not entered into until 1943, and it will show on the Morris Plan exhibit in the record.

Q. Returning to the year 1943——

A. Before I complete that answer, Mr. Marcussen, did you wish the detail of those contributions and the reason they were disallowed? I am able to give you that. I have testified that contributions claimed by the taxpayer were \$152.50 and there was allowed only \$25, a difference of \$127.50.

Q. And that refers to what? [232]

A. It refers to items labeled "Red Cross," "U.S.O." and similar matters.

Q. The items to which Mrs. O'Connor testified?

A. Yes, sir.

Q. Did you have anything further to add?

A. I can give you exact detail.

Q. Now, turning to the year 1943, please take a look at the deficiency notice for 1943. I will let

(Testimony of Paul W. Tormey.)

you use the copy that was attached to the petition, and I call your attention to the first item appearing there, \$791.28, and ask you to state what that is?

A. That is sales tax taken by the taxpayer on her return as a deduction from gross receipts.

However, in confirming the amount of this sales tax with the State Board of Equalization, we found that it was allowable in greater amount and accordingly allowed the greater amount in her taxes on business, where it should properly be claimed, and increased her business receipts to properly reflect the total receipts actually received.

Q. Those total receipts actually included the amount she collected as taxes?

A. That is correct. I would like to give you the amount of taxes actually allowed, so the taxpayer will know.

Q. Does that item appear on any of these exhibits that you testified to earlier this morning, Exhibits J, K, or L? [233] If it does, please refer to that?

A. Yes, it does appear on Line 25 of Exhibit K, entitled "Taxes on Business" for the year 1944.

Q. '43, we are talking about.

A. '43, pardon me. For the year 1943, taxes claimed by the taxpayer amounted to \$1,112.24 which you will note we have increased by the amount of \$935.99, for a total corrected tax allowed the taxpayer in that year of \$2,048.23; sales tax, \$872.99 in that amount. There are additional details I can give you.

(Testimony of Paul W. Tormey.)

Q. What is the difference between the \$800 figure you just gave and the \$935.99?

A. I will get it for you. We allowed her additional tax on the pinball machine in the amount of \$19.25, and deducted that as to old age benefits and Social Security in the amount of \$1.75.

Q. Then this item, \$791.28, as it is shown as an item of increasing the income, increases it in that amount and allows it in a greater amount in a different place, in its proper place?

A. That is correct.

Q. Now, you have allowed for 1943 an increase in business expense of \$3,887.05 on the deficiency notice, and I ask you whether you can explain that?

A. Yes, sir. [234]

Q. On Line 31 of Schedule K you will find a total business deduction for the year 1943, as disclosed by the taxpayer's return, \$22,493.40. As corrected, they were \$26,380.45, or reflecting an additional business expense allowed in the amount of \$3,887.05.

How were those additional expenses determined by you? I am just asking you how, the method, now?

A. By comparison of the amount claimed on the returns with the information disclosed by the taxpayer's black book in evidence, or her check stubs or supporting details such as the Heyman statement would, in this year.

Q. After an audit of her books from her books and records, also from conversations with her?

(Testimony of Paul W. Tormey.)

A. Oh, yes, admissions by the taxpayer's sworn statement.

Q. Let's not say "admissions,"—claims by her that you allowed, is that correct?

A. Yes, indeed. This was all in her favor.

Q. Now, turning to the year 1944, Mr. Tormey, I call your attention to an item of \$519 appearing as "Income from Rent Understated," and ask you whether or not the data from which that figure is computed is already presented in other exhibits which have been introduced in evidence here.

A. Specifically that rental schedule which was introduced this morning—the gross rents will be reflected on the [235] rental statements which are in evidence and schedule K here, also receipts are set forth on Exhibit K.

Q. Are they reflected in Respondent's Exhibits O and P? A. In part.

Q. Well, do you have a breakdown of the figure, exactly how that was computed?

A. Yes, sir.

Q. Will you give it then, please?

A. Rental income from 597 Valencia Street, where the statement was admitted in evidence.

Q. Is it one of the exhibits?

A. That is right.

Q. I will produce it.

A. I think it is No. 23.

Q. I hand you Sub-exhibit 26 of Exhibit 5, offered in evidence here, and ask you whether the information contained on that exhibit—

(Testimony of Paul W. Tormey.)

A. Yes, at the bottom of the page under the year 1944, items of rent for each month of the year are set forth in columns under the headings "Apartment No. 2, 1, or 4," as the case may be, and the total amount, \$1228, which has been approved by the taxpayer.

Q. As her rental income from——

A. 579 Valencia Street.

Q. All right, what other figures? [236]

A. The Baker Street property appears on the schedules just submitted this morning.

Q. Exhibits O and P?

A. That is correct.

Q. And you got your total gross rents, then—they are reflected in those schedules?

A. That is correct.

Q. Then, go on with your explanation of how you get down to the disallowance or the increase in income of \$519?

A. The amount of rent collected from 2710 Baker Street, as shown in the evidence, is \$1,775, so that those two together would have totaled \$3,003. However, the taxpayer reported the total rent received on Baker Street as \$2,484 and \$709 of that had to be transferred to the year 1943 because I determined in my audit that that is what the report covered, the acquisition from the time the property was acquired by the taxpayer to the end of the year 1944, so she was actually attempting to report more income in the year than she was charged with, so we reduced the income \$709 and

(Testimony of Paul W. Tormey.)

increased 579 Valencia Street, \$1228, making net rental income of \$519 not reported.

Q. Now, continuing for the year 1945, from this copy of the deficiency notice which is attached to the exhibit, I will call your attention to an item of \$218.03, and ask you whether it is necessary to make a mathematical correction [237] there?

A. Yes, there is a typographical error on the deficiency notice of 90 cents, I believe. The correct amount is \$218.93.

Q. And will you explain how that amount is computed? It is identified on the deficiency notice as "Increase by Overstatement of Repairs, Schedule G."

A. This adjustment corrects the net overstatement of repairs to the taxpayer's frame apartment house at 2710 Baker Street, San Francisco, as detailed in Schedule C of her 1944 return. The corrected figures are as follows: Do you want the details?

Q. Just explain it.

A. Paper and painting, reported as \$860.52, corrected to a greater amount of \$913.97, or an increased deduction of \$53.45.

A heating system repaired was claimed by the taxpayer on her return in the amount of \$301.75 which is entirely unallowable as a business deduction because it is a capital item purchased and subject to depreciation along with the life of the building, so \$301.75 was disallowed in that category.

Then we allowed Miscellaneous Repairs that the

(Testimony of Paul W. Tormey.)

taxpayer did not claim but was revealed by an audit of the books, \$29.37, so if you add the increased allowance of \$53.45 on papering and painting and the miscellaneous repairs [238] \$29.37 together, and subtract them from the disallowed water heater, \$301.75, you will have \$218.93.

Q. Then the next item is a disallowance of \$510.23, as identified on the deficiency notice for the year 1944, Schedule B, increased by one-fifth depreciation, repairs and other expenses of apartment house used as taxpayer's residence.

Will you give your explanation on that?

A. The amount represents that portion of the adjusted expenditures allowed the taxpayer in Schedule B of her return as a deduction from rental income which is properly chargeable to her as cost of her personal residence, under the regulations. The 2710 Baker Street apartments had five units with the following OPA ceiling at that time in effect. Do you want those details?

Q. No, I don't think we need to go into those.

A. No. 1 was \$37.50; No. 2, \$30.00; No. 3, \$30.00; No. 4, \$55.00, and No. 5, \$55.00.

Now, Mrs O'Connor occupied No. 5 from February, 1944 through December, 1944. This adjustment applies one-fifth of the total depreciation for repairs and other expenses as her personal expense.

Q. By virtue of her occupation of the apartment?

A. The point in stating the other rentals is that actually she should have been charged a greater

(Testimony of Paul W. Tormey.)

proportion [239] because she was occupying one of the more expensive apartments in the building and should have borne a greater percentage than the one-fifth allowed. I might add that a deduction will be allowed in her personal schedule for the amount of interest and taxes disallowed in this adjustment. She is also entitled to a full deduction for interest and taxes.

Q. Now, can you give an explanation of the decrease in item identified as a decrease in cost, in the amount of \$3,936.32?

A. Yes, I can. It has to do with the cost of taxpayer's merchandise sold, cost of goods sold. May I see the item again?

Q. I beg your pardon. It shows a net amount of—well, that is the total. I am talking about the item of \$3,936.32.

The Court: The next item below the \$510.23 on the statement of deficiency notice and, as a result of some adjustment, cost of goods sold, rent, repairs and other expenses.

Q. (By Mr. Marcussen): Can you give a detailed explanation of what goes into that, the make-up of that item?

A. Yes, sir.

Q. I call your attention to the fact that, in the [240] column to the left of the column in which that item appears, there are several computations there, finally arriving at this figure, \$3,936.32. Now, returns are here. Would you like to use her returns for the purpose of your explanation?

A. No, I have the details set forth here, but you

(Testimony of Paul W. Tormey.)

are asking me specifically about this one item. I want to make it clear whether you want me to go over this whole thing.

Q. Well, Mr. Tormey, that appears, it seems to me, as the total, the net adjustment from several other adjustments appearing in another column. Now, can you give the details to the court as to how that item is computed?

It says "Add Decrease in Cost." Now, are you prepared to do that at this time, or would you prefer to do that a little later, make a computation and come back later?

A. Well, I have all the information.

The Court: Well, can you give it?

The Witness: I will have to go right back.

Q. (By Mr. Marcussen): Would you like to be recalled for that? Are you prepared to give that now? A. Just as you wish.

Q. The question is: Are you prepared to do it now, or would you rather study your papers?

A. I can probably expedite my testimony.

The Court: Can we move on to other items?

Q. (By Mr. Marcussen): We will move on and give you an opportunity to do that.

Then there is an item, "Add Decrease in Contributions Claimed, \$481." Now, I will ask you whether or not that is based on the items entered into the books as donations for various charges which Mrs. O'Connor testified constituted gambling losses and other items not what they were stated to be in the book.

(Testimony of Paul W. Tormey.)

A. Yes, I can explain it. The adjustment corrects the net overstatement of deductions on the 1944 return, standard deductions of \$500 were claimed by the taxpayer and had to be disallowed because audited deductions set forth and itemized such as interest, taxes, and losses exceed \$500.

Moreover, the standard deduction was claimed incorrectly by the taxpayer because she had already included deductions for charity in the amount of \$586.50 on her business schedules and that is included in the total rent, repairs and other expenses under Item 17 of 1944 return, Schedule C.

Q. In other words, the items for charity which she claimed are included under business deductions on the return for 1945? A. That is right.

Q. And as respects this particular deduction, the [242] standard deduction of \$500 per return, that is the amount reported by the taxpayer and we corrected that to \$19.00 of regular contributions in the statutory deductions, and the difference there is \$481.

Q. So she was allowed a small item of \$19 as a contribution, and the rest was disallowed on the basis of her statement to you that they did not constitute these contributions to charity as indicated by her. Is that correct? A. That is correct.

Q. Did you state that the standard deduction was claimed and disallowed?

A. Yes, sir, for the two reasons.

Q. Well, don't give the reasons, but I don't see

(Testimony of Paul W. Tormey.)

anything on the deficiency notice about it. Can you explain that? Perhaps I don't understand.

A. This has to do with——

Q. Do you know whether she claimed specific deductions which are covered by the standard deductions? Is that correct?

A. That is correct. Both places.

Q. And the \$500 standard deduction was therefore disallowed, and she was allowed the specific deductions in so far as she could verify them?

A. That is right.

Q. Now, then, I call your attention to the deductions [243] which were allowed, shown on the adjustment to net income for the year 1944 and ask you to state in general what they comprise?

A. They apply to the taxpayer's subsidiary schedules B and C, having to do with the operation of her business, other expenses, salaries and wages, business taxes, loss, which are allowed as business loss.

Q. Are those items covered here on any of those exhibits that have been introduced in evidence?

A. Yes, sir.

Q. Which ones?

A. All of them are covered.

Q. Not which items, which exhibits?

A. Well, Exhibit K for example. I point to Line 43, \$20.37.

Q. I see Losses.

A. It appears on there, yes. The other items are combined in the adjustment to the business schedule

(Testimony of Paul W. Tormey.)

which I could give you the detail of by referring to my detailed breakdown, if you wish.

Q. Which of the items on the deficiency notice can you identify that are not described in detail on this schedule which has been admitted in evidence here this morning? Let's take the first one, \$289, not introduced on Exhibit F.

A. It doesn't appear. [244]

Q. Is it included in the total computations of Exhibit K? A. Yes, indeed.

Q. What are the items on Exhibit K which reflect that item of \$289 in the deficiency notice?

A. That is an item of \$120. I was wrong here. Item labeled "Schedule B", increase in other expenses, Schedule F, \$289, actually applies to the increase in rent expense which we have, other rent expenses as corrected amount to \$927.83 as claimed on the return as Schedule F, amount to \$638.83 which reflect the increase.

Q. This \$289 is the difference between \$927.83 which you allowed as corrected expense over and above the amount of \$683.

Do you know now what they pertain to? Were they ascertained from her books after a detailed audit of them?

A. Oh, yes. I can give you the details, but I know it applies to rent expense. I was looking through the business schedule.

Mr. Crittenden: \$638.83 was reported.

The Court: That is what was claimed, the amount she claimed.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: And the \$927.83 is the amount allowed, so this is the difference, \$289. [245]

Q. (By Mr. Marcussen): The next item is "Increase, Salaries and Wages, \$771.90."

A. That adjustment corrects a net understatement on the taxpayer's 1944 return of wages paid. I can explain how it is arrived at, if you wish. First, I will have to give you the background. She employed her sister, Rose Mattick, during this year. Mrs. Mattick had a stated wage of \$30.00 per week for a portion of the year and a stated wage of \$50.00 a week for the balance of the period.

However, she made certain expenditures for the taxpayer which are covered in the sworn statement in evidence in the nature of both business expense and personal items, such as stock and other purchases for the taxpayer. At the end of the week or two weeks, when Mrs. Mattick was paid to the amount of her stated wage, an excess amount to cover these additional expenditures that she had made on behalf of the taxpayer was given her.

However, the taxpayer, from the invoices in the case of her business entered the liquor or beer purchases, beer and other supplies that were paid out by Mrs. Mattick in cash as if they had been paid from the business, and, in the sworn statement, she explained that it is a duplication of entries there; so as not to penalize the taxpayer for this excess amount, which amounted, in total amount for the full year, to \$2,316.05. The taxpayer estimated that \$500 of that [246] \$2,300 would be applicable to

(Testimony of Paul W. Tormey.)

her as personal expense of her own, having no connection with the business.

Q. You mean personal expenses in connection with purchases? A. For living expenses.

Q. Which Mrs. Mattick, her sister, made for her?

A. That is right, and the taxpayer—it was her estimate of the amount—so that the other amount was taken out of the totals.

Q. The other amount? Identify that, please.

A. I have testified that there was a total of \$2,316.05 of which \$500, Mrs. O'Connor accepted the responsibility for.

Q. And by "other amount" you mean the balance?

A. The balance amounting to \$1,816.05 was excluded thereafter from our computations of business income, under source and application of funds method, by reason of the fact that the taxpayer testified that all business deductions which were included in that amount had been entered from the invoices and already appeared, and so we got to the proper amount of Mrs. Mattick's salary. The return claims wages, under the schedule, of \$4,051.50. The correct amount of all wages is \$5,823.40, and the increase which we have allowed by the auditor going through these books, is \$1,771.90.

The Court: In other words, that deduction was increased by that amount? [247]

The Witness: Yes, sir.

Q. (By Mr. Marcussen): Was there a corre-

(Testimony of Paul W. Tormey.)

sponding increase in allowable business deductions?

A. No.

Q. Then there is an item for increases in taxes on business. I think that is self-explanatory, over and above the amount she claimed. Can you identify that very easily as to what the difference is?

A. Yes, sir. It is made up of a net increase of \$27.50 on a Federal liquor license which we found had been paid, but not claimed by the taxpayer, less an overclaim of \$1 on her City Health Permits. It was claimed on the return in the amount of \$19.00 and the actual amount is \$18.00, so the additional allowance was \$26.50.

Q. Then there is an item, increase in losses, schedule G, \$100, unreported theft of Rex Price.

A. That appears also on Schedule K on Line 26, Losses in Business. Her return showed corrected amount \$100 additional allowed. We accepted the taxpayer's sworn statement that Rex Price, a bartender, had stolen the money, and it was confirmed that she had reported it to the police in good faith.

Q. There is an item, one-fifth interest paid on apartment house, \$27.50. [248]

A. That is the portion of the taxpayer's interest and taxes included in the one-fifth disallowance of the total business deductions on the apartment house. We now allow her to take a personal deduction for the interest and taxes included.

The Court: In other words, it is an offsetting adjustment to the amount added in above?

The Witness: Yes, sir.

(Testimony of Paul W. Tormey.)

The Court: The same thing is true of the \$63.69 in taxes?

The Witness: That is correct.

Q. (By Mr. Marcussen): Then State Income Tax, \$44.96.

A. The taxpayer failed to claim her state income taxes as a deduction, and we allowed that.

Q. And \$505.00 bad debts. How about that?

A. It is explained by the letter itself. The taxpayer claimed she lost a purse and \$350, and paid Mr. Green for a bond covered in the sworn statement.

Q. (By the Court): And those three items total \$505.00 added deductions?

A. That is right, the \$150 is the credit allowed her that I testified to this morning on those loans, and \$150 is now written off in this year.

Q. Then those total deductions, all of those items [249] total up to \$2,821.42?

A. That is correct.

Q. Which were additional deductions allowed but not claimed? A. That is correct.

Q. (By Mr. Marcussen): Now, Mr. Tormey, for one of those years, was a deduction of some \$500 allowed twice for the liquor license?

A. I will have to explain the answer.

Q. Just answer that question.

A. It was not then.

Q. It was not? Then explain your answer.

A. Yes, sir. The taxpayer's return of the partnership with Victor Divers shows the payment of

(Testimony of Paul W. Tormey.)

1942 liquor license in the amount of \$525. The taxpayer's personal return shows on her business tax for 1942 the payment of license of \$525. The books disclose that this payment was made in December, 1942 and was therefore applicable to the year 1943, so that there is an apparent overstatement of the deductions claimed, but it is between the partnership and her as an individual, rather than on any one return.

Q. Well, the net effect of it is that she has a credit in the computation of her income tax for 1942. She has been credited with a deduction of the \$500-odd amount for liquor license twice, has she not? [250]

A. One and one-half times. She had a half-interest.

Q. Well, the \$500 for the liquor license was included in the deductions claimed on the partnership return for the computation of the Divers-Jost partnership income for the first six months of 1942, was it not? A. Yes.

Q. Then there was allowed to her on her personal account a similar item for the amount, for the year 1943, is that correct? A. '42.

Q. It was allowed in '42, but was it the liquor license for '43? A. That is correct.

Q. It was paid in December, 1943, the last days?

A. December '42.

Q. And how about for the year 1943, did she get a deduction for her business income of a liquor license in that same amount of \$500 for that year?

(Testimony of Paul W. Tormey.)

A. Yes, \$525.

Q. For the year 1944, did she get a similar deduction? A. Yes, sir.

Q. Can you state whether or not the taxpayer is on an accrual or cash basis?

A. She is required to be on an accrual basis.

Q. Because of the necessity of using inventories in the computation of her income? A. Yes.

Q. Can you state whether or not under those circumstances the deductions allowed for liquor license is a proper deduction?

A. It is an improper deduction.

Mr. Marcussen: That is all. [252]

* * * * *

CLARENCE L. KRAUSE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Marcussen): Will you state your name? A. Clarence L. Krause.

Mr. Marcussen: If your Honor please, before I examine the witness, I want to call to your Honor's attention, I wish to apologize to the Court for allowing these ledger cards and summary sheets that were produced by Respondent, introduced in evidence by Respondent, through the witness Roche, to be marked 11 and 12 respectively.

They should be corrected to indicate that they are the Respondent's Exhibits. They have a number

(Testimony of Clarence L. Krause.)

indicating that [253] they might be the Petitioner's exhibits.

The Court: Is that right? If so, that statement is sufficient for the record. I didn't know, I wasn't aware, that they had been so marked.

So the exhibits formerly marked 11 and 12 and pertaining to the testimony of the Witness Roche will be Q and R, because they are not Petitioner's exhibits.

The Clerk: Shall I mark the previous marking void?

The Court: Yes.

(The documents previously marked Petitioner's Exhibits 11 and 12 were marked Respondent's Exhibits Q and R, and received in evidence.)

Q. (By Mr. Marcussen): What is your occupation?

A. Special Agent, Bureau of Internal Revenue.

Q. Where are you stationed?

A. Sacramento.

Q. I will ask you whether or not this morning you consulted the records of the Superior Court in the action of Jost against Jost. Did you?

A. I did.

Q. Did you see on file there an affidavit signed by Mrs. O'Connor in connection with an attempt on the part of her former husband, to reopen that case?

A. I did. [254]

Q. Did you make a transcript of certain portions of that affidavit?

A. I did.

(Testimony of Clarence L. Krause.)

Q. I hand you your notes from which you made that transcript.

Mr. Crittenden: Suppose I suggest that you get a photostatic copy and put that in the record and save all this time and trouble.

Mr. Marcussen: No time and trouble—getting a photostat would be more time and trouble.

The Court: If Mr. Crittenden agrees that it go in——

Mr. Marcussen: Will you agree that this go in?

Mr. Crittenden: Whatever is in the record, if you want to type it in, after you have prepared it.

Mr. Marcussen: We could let him read his own notes and if that is not satisfactory, then we can get a photostatic copy of her affidavit.

Mr. Crittenden: You are putting me behind the 8 ball. I haven't seen the file. Type it up and tell me if it is a true copy and I will put it in.

The Court: By his statement, if you get it fixed up that way, then you may let him see it and he will agree to it.

Mr. Marcussen: That is all right.

Mr. Crittenden: I will even take your word that you [255] have compared it and it is the same.

The Court: That may come in by agreement of both parties and will be made a part of the record.

Mr. Marcussen: That is all. [256]

* * * * *

Mr. Marcussen: I will recall Mr. Tormey.

Whereupon,

PAUL W. TORMEY

resumed his testimony as follows:

Direct Examination—(Continued)

Q. (By Mr. Marcussen): Mr. Tormey, this morning we were speaking of an item of \$3,936.32 which appears on page 3 of the deficiency notice in this case. Have you prepared a statement reconciliation showing what that is composed of?

A. Yes, I have.

Mr. Marcussen: I will offer that as Respondent's Exhibit next in order.

The Court: Exhibit "S".

The Clerk: "S".

(The document above-referred to was received in evidence and marked Respondent's Exhibit "S".)

Q. (By Mr. Marcussen): Now, can you give a brief description of what that computation shows on Respondent's Exhibit "S"?

A. Yes. I can first mention that taxpayer's 1944 return has a schedule identified as C-17, "Other Expenses", which totals \$19,608.11. This total appears in Schedule C on line 17. We find that from the detail submitted by the [257] taxpayer, that it is made up of purchases, advertising, charities, utilities and so forth. Our audit disclosed adjustments to nearly all of these items. In the first place, the taxpayer's schedule C does not include any inventories, so that when the items identified as liquor, beer and wine, mixers, food and bar supplies are

(Testimony of Paul W. Tormey.)

adjusted and the inventories applied, the cost of goods sold is increased \$3,519.34.

Q. That is ending inventory for the year, is it not?

A. Yes. The items are items which are ordinary business expenses listed by the taxpayer as advertising, state income tax, charities, gas and lights, rent, laundry, insurance, repairs, miscellaneous and general expense. The advertising item we found could be increased by \$434.69. The income tax and charities were disallowed in this Schedule as testified to earlier this morning. The utilities were increased \$22.28. The rent was increased \$23.78; laundry increased 36c. Insurance, repairs and miscellaneous expenses were reduced as indicated in the Exhibit.

Q. \$84.64? A. \$14.03.

Q. That is the insurance?

A. Insurance \$84.64 deduction. Repairs \$14.03 reduction. Miscellaneous and general expenses \$38.23 reduction. The total of those increases and decreases amounts to a net decrease of allowances in this part of the Schedule of [258] \$416.89, so that the total decrease on Schedule C of the taxpayer's return is \$3,936.32 as shown on item on page 3 of the deficiency notice.

Q. Now, in making this audit with respect to the Lachman Bros. account, will you state whether or not you relied on this transcript of that account, Respondent's Exhibit "Q"?

(Testimony of Paul W. Tormey.)

A. No, I did not rely on this transcript. However, since the Exhibit came in——

Q. I don't mean transcript. I mean these ledger cards?

A. No, I did not. I have checked the taxpayer's list of check payments and cash payments in her own records to the credit columns of these cards and find that they agree with the amounts which I have used on my application of funds source and application of funds statement which I testified about this morning. I notice that Lachman Bros. furnished a summary statement, showing the taxpayer's beginning balances, the purchases in each of the years and the payments in each of the years.

Q. That is Exhibit "R" you are referring to now?

A. That is right. While I was again able to check the purchases which appear as debits on this customer's card furnished for the Exhibit to the Application of Funds statement that I have prepared and talked about this morning, I was not able to check their own detail to this statement, so I [259] question that that is exactly correct.

Q. Well, you didn't rely on this in any summary statement furnished by Lachman Bros. accountant?

A. No, I did not, except to find out what the taxpayer's liability in each of the years was. I originally checked with Lachman Bros. directly, not to this statement. I secured the year-end balances from them at an earlier time, which checks with the details on this card.

(Testimony of Paul W. Tormey.)

Q. I see. You did not see this card before, but you got the information from their accountant?

A. Yes, from their bookkeeper.

Q. And that information is contained on these cards? A. That is right.

Mr. Marcussen: That is all.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Crittenden): Mr. Tormey, these papers which you have testified to in this case were made up in the same manner and are the same figures that you used in the two District Court trials?

A. You will have to explain your question, Mr. Crittenden.

Mr. Marcussen: Just answer it yes or no, Mr. Tormey.

Q. (By Mr. Crittenden): I want to know whether it is necessary for me to go [260] in and thoroughly examine you on these Exhibits J, K and L or whether those are the matters you testified to in the District Court?

A. I have made only one audit and the working papers and schedules that I have testified to have been the same, so far as I can recall. You must be aware, however, that items of income for the purposes of the criminal trial will not agree with the amounts as determined for the deficiency notice.

Q. Did you use different papers? I am referring to Exhibits J, K and L that I have in front of me here. If I used some other words to describe it, I

(Testimony of Paul W. Tormey.)

meant these three sheets of paper that I have here?

A. Yes, I understand what you mean.

Q. Now, Mr. Tormey, you were present at that ill-fated incident of April 3rd, were you?

A. I was present at a conference of the Technical Staff on April 3rd.

Q. And had occasion to talk to the taxpayer at that time? A. Yes.

Q. You talked to her about the case?

A. No.

Q. And asked questions about the case?

A. No. I was simply there as an observer of the Special [261] Agents Office. I had no discussion with the taxpayer or her representative about the case, as the case.

Q. You didn't say anything in the course of this conference?

A. No. I furnished information if Mr. Sorrell or Mr. Marcussen would ask me for it.

Q. You didn't use that as an occasion to drive a wedge between me and my client as a result of my interrogation in the District Court involving that "blond babe?"

A. I don't relate your two questions at all. I can answer the first question.

Mr. Marcussen: Do you understand the question?

The Witness: I can answer the first part of the question up to the statement that was made about the District Court.

Q. (By Mr. Crittenden): Answer the question.

(Testimony of Paul W. Tormey.)

A. I have no knowledge of the wedge between you and your client and I had nothing to do with same.

The Court: Now, let me observe here that references like "blond babe" and things of that kind, they don't mean anything to me.

Mr. Crittenden. They are in the testimony and your Honor will see that when you go through it.

The Court: I know that there is no reason for indulging [262] in that sort of expression here. Now, let's be simple and direct. You are not trying a case to a jury.

Mr. Crittenden: No, I am not. I am trying questions of fact.

The Court: All right, let's get along.

Q. (By Mr. Crittenden): Now——

A. I would like to amplify my answer to that question.

Q. Go ahead.

A. I overheard distinctly Mrs. O'Connor stated to all the members of the conference that she desired to discharge Mr. Crittenden.

Mr. Marcussen: Let's dispense with that. Let's answer the question.

The Witness: I answered I had no knowledge of the wedge, but I overheard that statement.

Mr. Marcussen: Just answer the questions, Mr. Tormey.

Q. (By Mr. Crittenden): Now, referring to your Exhibits, you testified there was an opening

(Testimony of Paul W. Tormey.)

inventory of the Tavern for \$1000.00 on Exhibit "J" as of December 31, 1941, isn't that right?

A. I did not so testify.

Q. Well, I take it then that that \$1000.00 on the first column up here——

A. This one here? [263]

Q. Yes.

A. That is the cost that she paid for the first half interest in the Tavern.

Q. What was the reference to that thousand dollar inventory in your direct?

A. Is that a question?

Q. Yes.

A. There was a thousand dollar inventory established at the time she set up her books for the purposes of our audit, deducting from the cost of her second half interest for which she paid \$1,600.50 by taking \$1000.00 on her own testimony as inventory.

Q. And this \$1000.00 appears in the computation of income and expense items on Exhibit K, I believe it is?

Mr. Marcussen: "K" is the income statement.

A. Yes.

Mr. Marcussen: Do you want Exhibit "K"?

The Witness: Which I can point out to Counsel.

The Court: In what column on the Exhibit?

The Witness: Beginning inventory, column 2, year 1942, \$1000.00.

Q. (By Mr. Crittenden): And at that time she only had a one-half interest in the business, didn't she?

(Testimony of Paul W. Tormey.)

A. No, I beg your pardon. We have just explained that [264] she had the whole business, but of the part, she paid for the last half, \$1000.00 of it by her own agreement was considered as merchandise.

Q. Now, you made an analysis of the expenditures, personal expenditures and had it entered down here, I believe, it was 8 or \$900.00, was it?

Mr. Marcussen: Find it for him, if you can.

Q. That is \$935.00 on Exhibit "K".

A. Recorded personal expenses.

Q. Yes.

A. Those appear in her own books.

Q. And you added to that the \$2400.00 which you estimated was her living expense?

A. Yes, that was exactly covered in the testimony of her sworn statements, which are in evidence, very clearly that that is in addition to the recorded personal expense.

Q. I take it then that this is in addition to the recorded expense?

A. That is exactly right.

Q. You don't include them at all, one isn't inclusive of the other? A. No, sir.

Q. Now, I take it you set up—she reported entirely on a cash basis, didn't she, in all these returns?

A. I don't know what basis she reported on. She is [265] supposed to have reported on the accrual basis. The absence of inventory, we have no

(Testimony of Paul W. Tormey.)

way of knowing whether it was a cash basis or accrual basis.

Q. You have seen Mr. Bozerman's work sheets, haven't you?

A. I have seen some of his work sheets.

Q. Yes, that he used in making up the returns; you saw them, didn't you?

A. I don't understand the question. I have answered I have seen some of his work sheets.

Q. And they are on a cash basis entirely?

A. I would be rendering an opinion of his working papers and I am not qualified to do that, Mr. Crittenden.

Q. Now, you didn't intend to make up this account on the hybrid system?

A. I heard you give a definition of the hybrid system and if that is the system you had in mind, I did not.

Q. You made up these accounts originally for the District Court both with and without inventories, didn't you?

A. I didn't make up the accounts on that basis. The certain hypothetical results were tabulated on the basis, including inventories or without inventories. They were done by the technical advisors. I think Mr. Mytinger testified to it.

Mr. Marcussen: What trial are you referring to, the [266] first or the second one?

Mr. Crittenden: Both of them, I believe.

Q. (By Mr. Crittenden): Now, asking you to examine the sheets, will you tell me how many items

(Testimony of Paul W. Tormey.)

which she understated her income on such as rents and other items? You have one here on Baker Street. Is there any other instance in which she understated her income?

Mr. Marcussen: Do you have her statements there?

The Court: Just an accounting?

Mr. Crittenden: No, the items.

The Court: You mean you want him to name them?

Mr. Crittenden: Yes, just name them?

The Witness: Do you want them separately or combined total also? How do you want them?

Q. (By Mr. Crittenden): You have an analysis there and I want you to read them off.

The Court: The various items where they are increased?

Mr. Crittenden: Where she understated her income.

A. I would like to explain any profit and loss statement is made up of a combination of totals of items. The detail within those totals may have items which had to be increased or decreased. Therefore, the totals themselves [267] are sometimes increased or decreased. Now, I would like to be able to qualify my answer, that I am reading the totals of certain segregations—

Mr. Marcussen: Just a moment. Counsel has asked you specifically, if I understand the question to state to him the specific items of understatement of her income, the actual income as compared with

(Testimony of Paul W. Tormey.)

the amount shown on her return. Is that what you want?

Mr. Crittenden: I say overstated like in the Baker Street property.

Mr. Marcussen: Overstated? Do you mean——

Mr. Crittenden: She stated too much on the Baker Street property and I am going to take the overstatement of that and the understatement of the expense. There is no pattern followed in this and that is what I want to bring out in the statement.

The Court: You had better get it straight there. You have wandered around considerably.

Q. (By Mr. Crittenden): Where she overstated income? One of the years was '44.

A. That is a good example of the question I had in mind when I said she overstated. In the year '44, the taxpayer's return reports \$2400.00 and I explained this morning the \$1205.00 of that rent was applicable to the Baker Street [268] property whereas she reported it all as Baker Street property. On the other hand, in the same year she failed to report any income, rental income from the Valencia Street property, so that the effect in that year, take \$519.00 overstatement of income rather than the amount that would have been overstated if you just deal with the Baker Street property.

Q. Now, as to deductions?

A. I haven't answered your question about these items. Do you want to forget that?

Mr. Marcussen: Finish your answer, please, Mr. Tormey, if you have anything further to say.

(Testimony of Paul W. Tormey.)

The Witness: I thought I was to find out wherein are items of overstatement of income.

Mr. Crittenden: Yes.

The Court: Go ahead.

Mr. Marcussen: Are you inquiring as to all years?

Mr. Crittenden: Yes, all years.

The Witness: Well, I believe that is the only one. There are some details within smaller segregations that would have that effect.

The Court: Effect? In other words, that would be the net effect of some of the other adjustments?

The Witness: That is right.

Mr. Marcussen: And your testimony was with respect to rents received in 1944? [269]

The Witness: That is right.

Q. (By Mr. Crittenden): Now, there was at the time when she stated her deductions, items of deductions smaller than she was entitled to according to your account. Will you give me those items?

A. Yes, there were a few of those. There again it would be a pretty long detailed process to give you all the details. I can give you the total wherein that happened, like items of cost of goods sold, we will say, if that applied. For example, in 1942 the net cost of goods sold by the taxpayer's return was \$9,026.89. The corrected cost of goods sold was \$7,518.78, so that there is an apparent overstatement, I mean an understatement of deduction by the taxpayer. That would be an overstatement of deduction by the taxpayer of \$1508.11, but it is

(Testimony of Paul W. Tormey.)

brought about by the fact that we considered the inventory figure reduced her cost of goods sold by applying the ending inventory and her return doesn't take the inventory into account. Is that the type of answer you want?

Q. Yes, that is the kind I want.

A. All right. In 1943 the net cost of goods sold was increased by our audit \$3,042.66, so that could be considered the taxpayer didn't take advantage of deductions. However, it is entirely explained by the absence of inventories again. I might say that the total for the two and a half [270] year period as respects that net cost of goods sold is that the audit with the inclusion of inventories reveals additional income by reason of disallowance of deductions in the amount of \$1,984.79.

Q. That is by reason of increased inventory?

A. Yes. She had no inventory at the beginning, according to her, and ended up with an inventory of \$5,808.04.

The Court: \$5,808.00?

The Witness: And 4c, yes, sir.

Mr. Marcussen: That figure, then, if I may interject here, Mr. Tormey—may I, at this moment?

Mr. Crittenden: You may if you wish.

Mr. Marcussen: That represents the overstatement of cost of goods sold during the two and a half year period, does it not?

The Court: Reflected by closing inventory at the end of that period, as I understood it.

The Witness: No, Mr. Marcussen. Our audit has

(Testimony of Paul W. Tormey.)

reduced the total cost of goods sold by \$1,984.79 by virtue of the fact that we have set up the inventory.

Mr. Marcussen: Very well. I think that is correct.

The Court: And that amount was the inventory at the end of the two and a half years?

The Witness: That is right. Now, you wish me to continue? [271]

Mr. Crittenden: Yes.

The Witness: For the year 1944, we allowed additional salaries and wages in the amount of \$1,771.90 about which I testified this morning. The details came principally from the Matticks and wages paid them and looking down the total column here and to avoid repetitions here, the increased allowances for taxes on business were \$763.69 for the whole period. \$100.00 on losses, \$56.00 on bad debts, \$39.00 on depreciation offset by a reduction of rent, repairs and other expenses of \$436.17.

The Court: \$436.17?

The Witness: Yes, sir. That is about all the detail I have, Mr. Crittenden.

Q. (By Mr. Crittenden): Now, I take it from those sheets of J, K and L, that the income you arrive at by increase of net worth and by the accounting method of receipts and disbursements are almost identical, aren't they?

A. I have reconciled them to be actually identical. The Application of Funds method reveals cer-

(Testimony of Paul W. Tormey.)

tain uncounted cash and the net worth assets which increased by these expenditures which were agreed to by the taxpayer exactly reconcile.

Q. Isn't that unusual to have them come that close?

A. Well, you may be thinking—well, I won't tell you. [272]

Mr. Marcussen: Just answer the question, Mr. Tormey.

Q. (By Mr. Marcussen): You don't consider that unusual at all?

A. If a Application of Funds statement, Mr. Crittenden, is made correctly, it would have to reconcile with the net statement or it is not a very good accounting. If the information is made available to you, it's just like a profit and loss statement connected with the firm that keeps double entry books or the surplus, as in the corporation. They have to tie in some place with the change of assets. Otherwise, it wouldn't be a true statement.

Q. You had an opportunity to make investigation in your audit?

The Court: What do you mean by that?

Q. (By Mr. Crittenden): Did you go out and inquire of various people what financial transactions they had?

A. Oh, of course, I investigated the taxpayer at the time of one of our statement. It took place on the Exhibit here.

Q. Those are the only ones appearing in that Exhibit?

(Testimony of Paul W. Tormey.)

Mr. Marcussen: Which one? May I have it identified?

Mr. Crittenden: I don't know. He has mentioned one. Which Exhibit is that?

The Witness: Statement of February 8, 1946, I know [273] refers to the fact in connection with the inventories, I told the taxpayer we had confirmed her purchases with these different suppliers so she could rely on the prices.

Q. (By Mr. Crittenden): Other than the evidence we have here that are the basic data of books, records, checks, statements of the discrepancies, that includes all of the matter that you have used in setting up this account, is that right?

A. So far as I can recall. I wouldn't like to limit myself by such a statement. I remember checking with Lachman's. I remember checking with several of the Diamond people. I remember checking the County records and the escrow agreements on the changes of property. I might overlook some item that you have in mind. I made the usual checks on items.

Q. We have all the basic data used in all of your computations used in the evidence here?

A. So far as I know you have. That was our intention to put it in.

Q. And that includes not the final computations, I mean the basic data and by that I mean the books, records, the vouchers, checks or the bank statements or such matters?

A. That is correct.

(Testimony of Paul W. Tormey.)

Q. Now, Mr. Tormey, you used the Application of Funds method in your accounting here? [274]

A. For the purpose of the civil liability that was always used. They haven't been changed. These schedules were dated the original date and haven't been changed a bit since.

Q. And your schedules were made on the base that so much money went through my client's hands in the certain accounting?

A. You can put it on that basis.

Q. I am trying to find out the method of accounting you used here so I can go ahead and ask some more questions. You used the Application of Funds method and the Source of Funds method in your accounting here?

A. I used the Application of Funds method and the Source of Funds method, yes.

Q. And that was the one used exclusively?

A. Our audit wasn't restricted to any exclusive method. We did this to determine the unreported business receipts; that was exclusively used for that purpose, I will answer it that way.

Q. Based on the fact——

A. It was not used for the purpose of the income deficiency system alleged in the criminal trials, if that is what you are aiming at.

Q. Do I understand that the way you set this up was a method of determining all the receipts and expenditures and that if she spent so much money, she must have received that much to have spent it? [275]

(Testimony of Paul W. Tormey.)

A. No. I proceeded to find out what the unreported income was by analyzing the known receipts and the known disbursements and the discrepancies between the two had to be income.

Q. Had to be from some source?

A. Well, she——

Q. Now, you made up a statement then of all the moneys that went through her hands?

A. They are in evidence, yes, sir.

Q. Now, you made up a statement, we will say, of the expenses that went through her hands in February of 1943. Would you bring out your work sheets and show what is that?

Mr. Marcussen: You are referring to an Exhibit?

Mr. Crittenden: I must have the data to arrive at the figuring during a certain accounting period. Did you set up work sheets on those?

The Witness: Why of course.

Q. (By Mr. Crittenden): Will you show me how you did it?

A. It's pretty voluminous, involves bank statements, Hyman's statements, everything.

Q. By the way, this was your first case you worked on with the Department, wasn't it?

A. It happens to be not "by the way"; however, it was.

Q. And the first spread was made by Mr. Krause, the [276] spread of checks?

A. Mr. Crittenden, I don't know whether I am required to answer this. I think Mr. Krause will

(Testimony of Paul W. Tormey.)

back me up on it that the original and the only spreads made in this case are right here and he or I can identify who made them and they have not been changed or even taken out of this folder since they were put there. What is your question now, please?

The Court: He wants February 1943.

Q. (By Mr. Crittenden): February, 1943?

A. Just what do you want in February? Do you want checks or cash disbursed?

Q. Now, let's start on disbursements entered in the book here as cash?

A. Are you going to take detailed items?

Q. We will take detailed items?

A. I want to explain that they are original spreads of checks and cash disbursements. Then there is a recapitulation of those cash disbursements for the same months and then there is a summary of redistribution, giving effect to the taxpayer's reallocation of these things; so, we may have to hunt through three sets of folders to get the details.

The Court: He may have to ask you specific questions and then you see what you can do with them. [277]

Q. (By Mr. Crittenden): Now, there is \$3.00 for Dr. Schottke. I want to find out how you handled that? We are going to get all the items that appear in this book.

Mr. Marcussen: Now, may I inquire of Counsel whether you propose to take every item entered

(Testimony of Paul W. Tormey.)

in that black book and interrogate the witness about it?

Mr. Crittenden: No, I am going to show that the totals he carries across do not bear a relationship to these items.

Mr. Marcussen: Now, if your Honor please, it has been established that this is about the most incomplete record that anyone could possibly keep. It was necessary and I think the evidence will show that it was necessary for this witness and other members of the Intelligence Unit of the Bureau of Internal Revenue to spend approximately from three to six months to conduct an audit of the taxpayer's books and returns, and Counsel is now proposing to go through every detailed item in the book to ascertain how it is handled there. Now, that might be competent cross examination, but he states his purpose is to show that the audit papers will not total the totals in the book and I will stipulate, your Honor, they will not so show. The books are completely inadequate and the evidence here is to the effect that this audit is based upon those books, upon independent investigation made on the outside to corroborate the deductions that she [278] claimed and also to corroborate income for the purpose of using it to interrogate her about her income and then based upon the statements that she made, which are in evidence in this case. He has completed that audit. Now, if Counsel proposes to pursue this line of questioning for the sake of showing a discrepancy between those books and this

(Testimony of Paul W. Tormey.)

audit, it proves nothing in this case and I will submit we will be here two months doing it.

Mr. Crittenden: I just hit a tender spot.

The Court: Now, just a minute. Let's get along in this case. Ask your questions and he will answer where he can and I will decide these points that you are concerned about. I have the record here and I have listened to how this is made up and furthermore I have had some experience with this sort of a case and this sort of a trial and I will do my own judging. All right, now, get down to the specific questions and we will get them in the record and if they amount to anything, why, we will determine then about how far we will go in that sort of stuff. If they do not, then we will leave it to argument on your briefs.

Q. (By Mr. Crittenden): Now, cleaning rug, \$4.55?

A. I want the record to show that Mr. Crittenden, after tell me to look for an item in February 1943, was pointing to an item in February, 1944, and I couldn't see it and I [279] think you did it on purpose.

The Court: Now, just keep your peace and let's go ahead with these questions and I don't want any bickering here.

Q. (By Mr. Crittenden): I am pointing to cleaning rugs \$4.55?

Mr. Marcussen: Let the record show that Counsel is pointing to the entry in the second column on the right hand page entitled February 1943.

(Testimony of Paul W. Tormey.)

A. You will note, Mr. Crittenden, that if you total column 10, it will come to \$13.98.

The Court: You will have to speak up. Everybody around here has to hear.

Mr. Marcussen: Just a moment. What is column 10?

The Witness: That is the column in which that figure appears.

Mr. Marcussen: Just explain what column 10 is in relation to the physical condition of that book? Where is column 10 in that book?

The Witness: It's the 10th column over from the extreme right-hand side.

Mr. Marcussen: For February 1943?

The Witness: Yes.

Q. (By Mr. Crittenden: The total is \$13.98. May I read into the record what is in it? [280]

The Court: Let Mr. Crittenden finish what he is going to do now.

Mr. Marcussen: If your Honor please, he has asked me to check it with him. I would like to have him check it with the witness.

Mr. Crittenden: I am going to read the column into the record.

The Court: You go ahead and do the reading and I will have the book and I will do the checking. Do your own reading and if you read wrong, that is your business.

Mr. Crittenden: Miscel., starts out with "music, .15; cleaning rug, 4.55; medicine and hair-do, 5.85; Dr. Spankey for bill, 6.00; phone and telephone to

(Testimony of Paul W. Tormey.)

May, 1.80; money order, Mom, 2.00; flowers Opal birthday, 3.00; flowers music, .55; flowers music, .55; policeman, 1.00; hair washed, set, 2.00; Dad's birthday, 5.00; gasoline, drugs, 10.00; salt-pepper shakers, .50; poppy card, .50; rug, 5.00; music, .60; Stell and hats for party, 1.85; drinks at Cozy's for anniversary, 7.50; music, .60; and the column Counsel says adds up to \$13.98.

The Witness: You didn't allow me to finish my answer. Do you wish to hear it?

Q. (By Mr. Crittenden): You may finish it.

A. Will you look at the work papers you were so anxious [281] to see.

The Court: Now, dispense with any of this side comment and get down to the substance.

Mr. Marcussen: Now, he has called to your attention this \$13.98. Do you have any answer to that?

The Court: He will make it. You don't help things along by that.

Mr. Marcussen: I will withdraw that.

The Court: You will have your chance to ask questions. Let this examination go on.

The Witness: I say the column was totaled at \$13.98 and that figure appears in the taxpayer's books. I repeat this is in this schedule. Come here. "As spread in the book."

The Court: That is in his work-sheet?

The Witness: "As spread in the book," column 10, a photostat. Actually, it is \$58.95 plus the \$6.50 garbage and those correct totals are accounted for on the righthand side of my sheet, including the

(Testimony of Paul W. Tormey.)

\$13.98, which is all charged to "general expense." \$40.00 was charged to Mrs. O'Connor personally which the nature of the items just read will certainly support.

Mr. Crittenden: Will you stipulate, Counsel, that he searched that and there is nothing for \$6.30 for garbage?

Mr. Marcussen: I followed you. Now, what do you ask me to do? [282]

Mr. Crittenden: Go down the column and see if there is an item for \$6.30 or items for garbage.

Mr. Marcussen: There is an item of \$6.50, at the bottom \$13.98. There is a pencil notation in the column.

Mr. Crittenden: I am talking about the books themselves.

The Court: Well, I suppose that is on the book?

The Witness: It shows in my photostat, garbage, \$6.50. It wasn't in any column.

Mr. Marcussen: Where are you?

The Witness: Right down there. I included it in here.

Mr. Marcussen: Where is garbage?

The Witness: Right here.

Mr. Marcussen: That is the \$6.50 I am talking about and extended over in the third column is garbage with no other amount in the column.

Mr. Crittenden: Now, let's take March.

Mr. Marcussen: 1943, I take it?

Mr. Crittenden: That is right. Where it starts: "Bosserman for filing income tax papers, \$45.00"?

(Testimony of Paul W. Tormey.)

The Witness: I have allowed it as \$45.00 accounting service.

Q. (By Mr. Crittenden): That is shown on which page? [283]

A. I don't have these pages numbered. These are my personal working sheets.

Q. It is dated at the top of it "January, February, and March of '42?"

A. '43.

Q. '43, excuse me. Now, the next one is "paper for door, \$1.36?" A. For who?

Q. "Paper for door, \$1.36"?

A. It's probably one of those bunches of cash items again. This is March now.

The Court: March, 1943?

Mr. Crittenden: Yes.

The Witness: Well, it is very evidently in the total of some of these cash disbursements that are grouped one entry in here, probably as miscellaneous expense. I do not see the \$1.36 as a separate item.

The Court: You don't have the segregation on your work sheet?

The Witness: That is right. For that particular month, there is a grouping for a lot of stockings.

Q. (By Mr. Crittenden): Now, there is "Brooks, stockings, \$13.85"?

A. I can answer that without looking. It would be charged to the taxpayer's personal expense. [284]

Q. Let's see it?

A. We have a total for the month of \$331.76,

(Testimony of Paul W. Tormey.)

cash disbursements. It's undoubtedly included in that. I do not see it.

Q. Will you tell me what items go into \$331.76?

A. I think I can by taking up the clear spread of that page and adding up the items that were personal. It could be proved out to be that.

Q. Will you show one how you got \$331.76? You start the column with a number of \$331.76. I want to know how you picked that particular figure out of the air?

The Court: I think we will dispense with the adjectives there. Now, you ask him his question.

Q. (By Mr. Crittenden): Will you give me the amount of the \$331.76, what items went into it?

A. Well, if somebody wants to add them up as I list them down here, we undoubtedly can do it.

Mr. Marcussen: Just a moment. How long would it take you to do this, Mr. Tormey?

The Witness: Well, there are about 80 items that are probably personal items, maybe not all of them. Let's see if we can get a few big ones; that will help. Groceries, \$5.68. [285]

Q. (By Mr. Crittenden): Repeat that amount?

A. Pardon?

Q. How much was that?

A. \$5.68. Let's not put groceries in for a minute. They may have been allowed as business expense. Kay's insurance, \$8.00" would be one item. "Bill, \$5.00. Bill, \$5.00. Bill, \$10.00."

Mr. Marcussen: B-i-l-l?

The Witness: Yes, that is her husband. "Music,

(Testimony of Paul W. Tormey.)

25c; Bud, etc., \$15.00; Bill, \$5.00; Bill, \$5.00; Bill, \$5.00; Bill, \$10.00; Bill, \$5.00; telegram to Mam, 85c; bridge fare, \$1.00; Bill, \$8.00; Bill, \$5.00; flowers, and eats, \$1.50; Bill, \$10.00". I am going to add that "paper for door." I think that is in her personal column, too, why I couldn't find it. "\$1.36; books and stockings, \$13.85; music .60." Strike those music items out. I think we allowed her music and flowers as part of the entertainment expense of the thing. But, we will go on. "Gasoline, \$1.64; Marie's baby, \$5.00; Mam's suit, \$29.95; Painting apartment—put a question mark after this one—\$37.00. Otto's birthday, \$2.00; hairdo, \$2.00; balance for painting—with a question mark—\$8.99; some sort of drugs, \$11.55; and Bill's suit, \$150.00. I think we are pretty close to it right now.

Mr. Marcussen: What was the last item, please?

The Witness: Bill's suit. Add those up and see [286] what we get.

Mr. Marcussen: That is approximately \$200 some odd dollars, \$210, somewhere around that figure.

Mr. Krause: According to my hurried computation, \$361.95.

Mr. Marcussen: \$361.95?

Mr. Krause: Not adding the personal column, it's \$361.95.

Mr. Marcussen: May I inquire what is the total items we are attempting to establish here again from your work papers, Mr. Tormey?

The Witness: \$331.76.

Mr. Crittenden: I get \$360.95. That is excluding

(Testimony of Paul W. Tormey.)

the groceries at \$5.68 and excluding that item he asked us to exclude and it's including the ones with question marks of \$37.00 and \$8.00.

The Court: All right, let's get along.

Q. (By Mr. Crittenden): All right, let's take the next one. Let's take, for instance, the items under the column here, like "flowers to ladies, \$2.51." I am going on to April, 1943.

Mr. Marcussen: Second column in the righthand page.

A. I will qualify my answer to this extent, that the column that you pointed to is column 11, or column 10, rather, and both column 10 and column 9 are added personal columns [287] and there appears at the bottom of the column in a group total \$1191.31 that somebody may have to total. Evidently extending over to items in column 9 also. Now, I point to my work sheet that the total personal charges given to Mrs. O'Connor during the month of April were \$1,096.73, which is also the indicated total of those three columns and I, therefore, state that the items of the "flowers for ladies" up there was very probably allowed as business deduction.

The Court: In other words, that would reduce the amount that you added the income as having been personal expenses?

The Witness: That is right.

Q. (By Mr. Crittenden): Now, let's take the next page of May? Suppose we take the first items up here something about flowers, \$2.06?

The Court: Where is that in the book?

(Testimony of Paul W. Tormey.)

Mr. Crittenden: On May 1943, the very top of column No. 10?

The Witness: The same situation applies exactly to that as to my last answer.

Q. (By Mr. Crittenden): You show me what your entry for that is?

A. Yes, sir. We have personal columns totaled at \$262.37 and in the book they appear as \$334.43. We can go and add each item, but it is substantially less. [288]

Q. Do you know which ones have been taken out of here?

A. I can't at this date screen them to make a statement.

Mr. Marcussen: Is this pencil total that you refer to shown in the amount of \$334.00 in your hand writing?

The Witness: No.

Q. (By Mr. Crittenden): Is that Bosserman's?

A. No. I don't know.

Q. You will see the evidence in the record that that is Bosserman's. Now, let's take another item here. Under column here, towels and napkins, being column 1, 2, 3, (counting column 8 on June, 1943, will you give me where that towels and napkins of \$3.50 is?

A. The date is what? Here we are. I have mentioned in two personal columns as spread on the books as \$351.96. Now, we can total these three columns and see if they—

Q. Bosserman puts \$776.28.

(Testimony of Paul W. Tormey.)

The Court: Now, don't say "Bossman" unless you know. Are you referring to those pencil figures?

Mr. Crittenden: Pencil figures of the 7 something.

The Witness: I have spread \$333.00 of that expense to Mrs. O'Connor as personal drawings items and \$18.25 being an error in the book deducted from this column. Let's see what we find, if you want to know about that?

Mr. Marcussen: Don't volunteer any statements. If [289] Counsel is interested, answer the question, please.

Q. (By Mr. Crittenden): Yes. So that your Honor will see what we are doing——

The Court: I know what you are doing.

A. Well, I haven't any other information on it. I was reading that explanation to you so that we deducted it from the personal allowance for business expense somewhere under here. It may be a mislabeling of the items.

Q. (By Mr. Crittenden): Could you tell me what makes up this item \$333.71?

A. Yes. That is the correct totaling of these three columns and I think we can establish that without—beyond peradventure of a doubt, if you just add them up, because that appears in my corrected audited column in the personal.

Q. I don't want to take the Court's time, but I will go on to the next item here. Let's take another one in here. Now, on July of 1943—I am pointing

(Testimony of Paul W. Tormey.)

to an item "flowers for party, \$7.69." I want you to find that one too.

A. I can probably go through the same procedure and find it.

The Court: All right, let's go through the same procedure.

The Witness: Yes, sir.

The Court: That is for what date?

Mr. Crittenden: Column 10 on July of 1943, the [290] item of \$7.69?

The Witness: We have personal columns totaled for \$351.96 and there is no cross reference to the personal column being corrected in that month of \$351.96. Oh, yes, here it is, the same error. I was talking to you about July.

Q. (By Mr. Crittenden): This is July?

A. Yes. \$351.00, it's the same answer I gave you.

Mr. Marcussen: What do you mean by "same error?"

The Witness: Well, the total per book, \$351.96, as per book, and it was \$333.71 per my audit. We allowed the \$16.25 as an error. It says "deducted from personal."

The Court: In other words, that is carrying that much less into her income?

The Witness: That is right.

Q. (By Mr. Crittenden): Now, I notice written there \$464.25 in personal. Where does that appear in the lefthand column over here?

A. We have nothing to do with those totals. Ap-

(Testimony of Paul W. Tormey.)

parently put in by Mr. Bosserman. I think he told me personally he did put them in.

Q. What are the other items that make this \$351.96?

Mr. Marcussen: Will you identify that figure, please?

Mr. Crittenden: I am pointing here to the sheet——

The Court: That is the worksheet of which——

Mr. Crittenden: The work sheet he has in front of me, that is in front of him, July, and it's down opposite, next to the bottom items before the total column or the total line and it's the lefthand column.

The Court: Well, that is unnecessary because that is not in evidence.

Mr. Crittenden: I will put it in evidence so we can work through our briefs and point out to your Honor the errors that appear in here.

The Court: All right.

Mr. Crittenden: I was trying to point it out to your Honor where it appeared.

Mr. Marcussen: Have you posed a question?

The Witness: He asked me where I got this total.

Q. (By Mr. Crittenden): Yes, I asked you where you got that total?

A. The amount assigned by the audit to the personal columns as they appear in the book.

Q. Your audit?

A. No, the schedules' audit. It happens to be Mr. Krause's preliminary work. It's Mr. Krause's handwriting. He is right here.

(Testimony of Paul W. Tormey.)

The Court: It is that part of the accountant's own books that you are carrying into personal expenses, is that it? [292]

The Witness: Yes, sir.

Mr. Crittenden: There is an item, "gave Edna for cleaning, \$5.00" on the same—that is No. 11 column, is it, on August '43?

Mr. Marcussen: That would be column 10. We think we have established there are 8 columns to a page here it appears.

Q. (By Mr. Crittenden): Column 10. "Gave Edna for cleaning?"

A. It will be the same answer, but I will look and see if there was. These personal columns in which that item appears were totaled for \$272.75 and charged to the taxpayer. Now, I will check and see if there was any adjustment to that. That is in August. Those columns plus this and this \$50.00 that he pointed out to me as being identified by "Red Cross."

Q. Which is in column 1, 2,—6, on February of 1943?

The Court: August.

Mr. Crittenden: August, excuse me.

A. The total of the personal columns recorded in the books as \$332.75 of which we spread \$147.75 to Mrs. O'Connor as personal item; \$50.00 was held in abeyance pending the statement that is the Red Cross items which was subsequently disallowed. \$33.40 was found to cover a ring and \$91.60 is an

(Testimony of Paul W. Tormey.)

error to be deducted and I will go to the adjustments.

The Court: What do you mean by "Adjustments"?

The Witness: I will bring that up. It's on another [293] work sheet. We had a conference with the taxpayer.

The Court: You mean that is the amount by which you are reducing her personal total there?

The Witness: Yes, sir.

Mr. Marcussen: When you say "error", are you referring to a mathematical error?

The Witness: It may be an error in distribution per books and that is why I want to check the figure.

The Court: All right.

The Witness: We have another summary. Did you get that 1943 statement from the evidence?

Mr. Marcussen: Yes. Let the record show that the witness has requested Government's Exhibit 4, which constitutes a part of Exhibit 5 in this proceeding and also Respondent's Exhibit G.

The Witness: No, there is nothing on there that applies to the entries we have under discussion. So, I can only assume that the particular \$5.00 that you pointed out in question, "gave Edna for cleaning," was charged to the taxpayer as part of her personal expense and included in that charge which I have mentioned of \$147.75 for the entire month.

Q. (By Mr. Crittenden): You can't break down

(Testimony of Paul W. Tormey.)

for the month what items you charged her personal expenses, can you?

A. Well, there is a total in this month of \$328.75.

Mr. Marcussen: On your working papers?

Q. (By Mr. Crittenden): Or which consist of the following items: \$22.50, \$102.00, \$35.04——

A. \$2.00, \$5.00—there is your item, “gave Edna for cleaning.”

The Court: And that is where?

The Witness: In her personal column.

The Court: In other words, that has been included as addition to her income as amounts expended by her personally?

The Witness: That is right.

Q. (By Mr. Crittenden): Then what are these, the one and \$47.75, the amounts in your worksheets? It says “personal column.”

A. It's from the assembly of these cash disbursements of the first section of the month. I will get to it here in a minute. We had \$272.75 here and we have a “loan to Rose.” That is——

Q. You say you have 272.75?

The Court. Now, what are those, dollars? How is the reporter going to know what you are talking about?

Mr. Crittenden: \$272.75 which shows “personal column”?

A. It's in this personal column some place. [295]

Q. (By Mr. Crittenden): They are in the personal column some place?

(Testimony of Paul W. Tormey.)

A. That is right. I have answered your specific question as to the \$5.00. Do you have another?

Q. The only way I can do is add all these together as referring to August, 1943.

Mr. Marcussen: Now, let's see what you are referring to adding all these together?

Mr. Crittenden: That will be the columns marked "personal column" which consist of four columns, is that right?

The Witness: That is generally correct, but even she was inconsistent in that. She might have personal items over here.

The Court: That is in columns beyond?

The Witness: Yes, sir. If you go through the books, you will find numerous examples of it.

The Court: I think that was demonstrated yesterday in her examination.

Mr. Crittenden: Yes, sir.

The Court: You can't necessarily stand by a particular column. You have to scramble through those whole columns. * * * * *

Q. (By Mr. Crittenden): Now, let's take another one, which is March, 1944, [296] under "novelties for party of Kindle & Graham." Is that the way you pronounce that, "Kindle and Graham," on the first column on the righthand page? Do you see what I am pointing to here, this \$20.00 item?

Mr. Marcussen: In column 10 for March, 1944?

A. May I see the book again?

Q. (By Mr. Crittenden): Go ahead and take the book.

(Testimony of Paul W. Tormey.)

A. I am going to answer this with a very slight qualification that I believe it is allowed as advertising expense by reason of the novelties.

Q. Let's see where the advertising expense is for that month or that accounting period?

A. Now, I don't believe I can answer you, Mr. Crittenden.

Q. May I ask you this: Is there a personal item for that accounting period in which that would be included?

A. Oh, yes, it could have been and might very properly belong there.

Q. Will you tell me what that item is?

A. We charged \$136.14 for the month. "Items of cash disbursement", that would be it.

The Court: That would be in personal?

The Witness: Yes, sir.

The Court: That is the total you have charged as being personal? [297]

The Witness: During that month, yes.

The Court: All right.

Q. (By Mr. Crittenden): Could you tell me what other items would be in that personal items so we can see if we have that \$20.00 in there?

A. We would have to add them up again.

Q. All for March?

A. That is right.

The Court: All right, if we have got to add them up, read them off and let's add them.

Q. (By Mr. Crittenden): You read them off?

A. Now, tickets for something or other, \$9.00.

(Testimony of Paul W. Tormey.)

More "tickets, \$13.00; flowers, \$4.50." Again that might have been allowed. "Dinner at the Clift House, Mam and Rose, \$9.45." "Dr. Spankey"—no, that was paid by check. "Stove repairs, \$23.87."

Q. \$23.87, not a \$13.00 item, is that right?

The Court: \$23.87.

A. "Treat to Tomales, \$4.00; cough medicine, \$1.18; those novelties, \$20.00." Here is an unidentified item of \$50.00 it has no name on it at all. "Piggy bank, \$1.00." I think that is about it. There are some other items I can give you, if you are short here. The figure was \$136.14. That was entered for those cash disbursements. [298]

Mr. Marcussen: Where, on your working papers?

The Witness: Yes. How much did those items total?

Mr. Crittenden: \$135.00 is the sum I got. \$135.00 even.

The Witness: That is it, as near as I can come to it.

Q. (By Mr. Crittenden): That included then the novelties for the party?

A. Evidently, they were, yes, sir. I might explain—yes, sir. I assume it would be novelties for party.

Q. You didn't give credit on entertaining?

A. No. It appears in her personal column in the book and novelties would be for personal party, as far as we can tell. At least, that is my best recollection as to what happened.

Q. Now, may I have that gray book. Now, you

(Testimony of Paul W. Tormey.)

handled these items of expenses on the righthand side in July and August?

The Court: '42?

Q. Of 1942 in the gray book. How did you handle it?

A. It will just be a recollection, if that will do as an answer.

Q. No, I want to see your records?

A. We don't have those in the record because all of the entries subsequent to July 15 were transcribed supposedly into [299] the black book and the disbursements were taken from that book.

Q. You didn't use this gray book after July 16th for any of the purposes of this account then?

A. I didn't use the gray book for anything.

Q. Did you check to see how Mr. Bosserman handled the accounting of the partnership in the first half of the return?

A. No. The partnership return was not under investigation.

Q. You certainly could make the same mistakes in that as he could make in the other accounting?

Mr. Marcussen: I object to that as calling for a conclusion.

Mr. Crittenden: You assumed it was true and correct in your opinion?

Mr. Marcussen: He has testified there was no challenge to it as it was set forth in the partnership return, is that correct, Mr. Tormey?

The Witness: That is right.

Q. (By Mr. Crittenden): It was not audited?

(Testimony of Paul W. Tormey.)

A. That is correct.

Q. How much of that income of the partnership did you attribute as being in physical assets of that partnership?

A. That is rather a compound question. I know what you mean and I think I can answer it. For the purpose of Application [300] of Funds, Mrs. O'Connor was credited with the full amount of that income whether or not it was actually used for those purposes.

Q. Then is it not in the net worth?

A. Application of Funds statement, in this.

Q. You applied all of that to her income, as I take it, then? Is that what I understand you to mean or do I understand you applied this to assuming that she could have reinvested that?

A. I assume it was available for reinvestment there. It appears \$2116.05 on line 36 of Exhibit "J".

Mr. Marcussen: Is that all the partnership or her share?

The Witness: Her share.

The Court: Now, let me get the answer. You treated that as money from that source and you made no——

The Witness: As respect to it, we assumed the whole thing was available to her for the other items known to be acquired, the other expenses known to be acquired during the entire year.

Mr. Marcussen: In other words, it appears as a source of money for the purpose of that statement of the sources and application of funds?

(Testimony of Paul W. Tormey.)

The Witness: That is right. That is correct.

Q. (By Mr. Crittenden: Now, let's go back to November '42. I am doing this at random so as to show what we have done and the question is applicable in '42. This item here, "globes, \$1.65." I want to see how you handle it, in which column you put it, personal or business?

A. That is November? It's in the miscellaneous column.

Q. Under the miscellaneous column?

A. There is a total identified of \$127.05.

Q. That miscellaneous column 10 in this case?

A. Correct.

The Court: You will have to speak out.

Q. (By Mr. Crittenden): This is 10? That is \$127.05 written in pencil?

A. Right, on my work sheet I have shown that total, "Miscellaneous, \$127.05," a check therein included for \$3.49 for phone. That may have come from her check stubs.

Q. May I have that item again, the amount, \$3.00? A. And 49c.

Q. I can't find an item of \$3.49. Can you find it there? A. It may be in the checks.

Q. Oh, there is an item for phone, \$4.50?

A. It may not be even in that book, but in any event, the balance, \$123.56 has been distributed as follows: Personal drawings of \$106.60 and advertising and general expense of \$15.30, so that the item marked "globes of \$1.65." [302]

(Testimony of Paul W. Tormey.)

Q. Excuse me, globes of \$1.65 is divided which way?

A. I can't recall whether it's in that \$15.35 or in personal of \$106.60. I wouldn't have any way of knowing.

Mr. Marcussen: What is the \$15.00 some odd expense that you refer to, what item is that?

The Witness: Advertising and general expense, deductible items that we allow. The fact that there are that number of deductible items out of that one little total would lead me to suspect the globes were allowed.

Q. (By Mr. Crittenden): You would have to take the full page analysis?

A. No, sir. In this case you would have to take that one column.

Mr. Marcussen: Identify the column for the record.

Mr. Crittenden: Column marked "missel" on the right in November, '42, totaling in pencil under it \$127.05 which appears to be in the taxpayer's handwriting. Now, I think this examination has probably brought out as much as if I kept at it a couple of days, so I will go ahead and pick up another point.

The Court: I think that would demonstrate you are about half way through?

Q. (By Mr. Crittenden): All right. How much do you depreciate the lease that my client had on those premises on Valencia Street that [303] terminated in 1945?

(Testimony of Paul W. Tormey.)

A. As respects the lease, we did not depreciate at all. The fixtures and furniture were set up a valuation of \$780.80 per the taxpayer's 1943 return. We, therefore—and depreciation was claimed on the 10% basis or \$78.00 for the entire year. Therefore, for the six months of 1942 on the same basis, we allowed \$39.00.

Q. You carried no depreciation on the lease and the only depreciation you carried is that which is shown on the taxpayer's deed, is that right?

A. Yes.

Q. Or is there any other depreciation?

A. Not as respects the Valencia Street property.

Q. Now, how did you carry the depreciation on the furniture?

A. I have just explained.

Q. That in the bar that was used by the sister in entertainment?

A. I have no knowledge of such furniture.

Q. You didn't carry any depreciation at all?

A. No. I know about furniture, depreciation of the furniture that went upstairs. It's not subject to depreciation.

Mr. Marcussen: Which apartment are you speaking about? [304]

The Witness: Well, any of the apartments. That Valencia Street particularly, I think he is talking about '42 and '43.

Q. (By Mr. Crittenden): Now, how was the husband's salary handled before the marriage? Part

(Testimony of Paul W. Tormey.)

of it was not carried in this account, but charged in the assessment level, is that right?

A. You have mis-stated the situation by the choice of words, but I think I can answer it.

The Court: Go ahead.

A. Mr. Jost reported on the joint return for the year 1942, \$1380.00 as his salary, of which we determined that \$965.00 was earned during the period of his marriage. The difference thereof would be earned prior to his marriage and we don't know how he spent that money. So, as far as the Application of Funds statement, that was made reflecting the acquisition of assets and giving credit to Mrs. O'Connor for the use of any money that we knew about. We assumed that Mr. Jost very kindly turned over his entire salary to her that he could have earned and during that period \$965.00, and, therefore, the unexplained credit that we had to balance the money, application of funds, was less by the amount of \$965.00 than it would have been. So, when you use the word "charge", it's incorrect. We credited that entire amount as available to her.

Q. Now, the husband's earnings before the separation in 1943, how did you treat those, the husband's earnings in 1943 before the separation, how did you treat those? He went to work in June, July or December. How did you handle that income?

A. Just as they are handled on the return.

Mr. Marcussen: Do you recall now whether they are on her returns?

(Testimony of Paul W. Tormey.)

The Witness: I think he is talking about the year 1943. Let me check my schedule.

Mr. Marcussen: All right.

The Witness: We show no salaries received in 1943 at all.

Q. (By Mr. Crittenden): You did not handle any sums there at all? A. No.

Q. And none of the money that he received after the separation or after the divorce was treated at all as any income of my client? A. No.

The Court: I don't understand any of it was ever treated as her income.

The Witness: None of it was treated as her income except for protecting her on the Application of Funds statement. [306]

The Court: That use was to her benefit?

The Witness: That is correct.

Mr. Marcussen: And that was for the year of 1943?

Mr. Crittenden: The accounting was done on the income prior to their marriage. They didn't compute any of that in either of the returns.

Q. (By Mr. Crittenden): Now, you didn't treat anything as community property at any time, did you? A. Not to my knowledge.

Q. I see. You didn't at any time?

A. No.

Q. And you realize the business was acquired on credit, half interest of the business was obtained by borrowing money?

(Testimony of Paul W. Tormey.)

Mr. Marcussen: Object to that on the grounds it is calling for his conclusion.

The Court: Read the question.

(Question read.)

The Court: What do you want? You say "you realize."

Q. (By Mr. Crittenden): How is the second half of the business acquired in 1942, do you know?

A. Yes.

Q. How?

A. The taxpayer borrowed some money at the Morris Plan [307] Company and together with three or four hundred dollars that she testified she had in her own savings or in the Bank at the American Trust Company, she paid for the half interest in cash.

Q. Was it secured or unsecured?

A. I do not know. The evidence will speak for itself. Whether Mr. Jost endorsed the note or not, I don't recall.

Q. Now, you used these four values that were in evidence in Exhibit "B" in your computations there, that is the four bonds used in acquiring the property from Mr. Hyman?

A. That is correct. I mean, I have made allowance for them in all of my computations. They were acquired in the year 1942 and disposed of in the year 1943, so that for my purpose, they were cash. There was no interest turned on them and they were in and out.

(Testimony of Paul W. Tormey.)

Q. Were there any other Government bonds that appeared in the account?

A. Yes. During the year 1944 the taxpayer purchased or paid out for an item identified on her books as "U. S. bonds," the sum of \$243.75, which I so show on the final balance sheet for December 31, 1944.

Q. Now, I take it in your accounting you treated gambling losses as money that was not part or equal to income from gambling in any way?

A. I can't understand the question. I am sorry.

Q. Well, now you charged all moneys that she lost in gambling as income to her, didn't you, that she must have had the money to have lost it?

A. My application of funds statement in so far as gambling losses were paid out by check or were testified to by Mrs. O'Connor as having been paid in cash. They are a part of the debts and the Application of Funds statement and, therefore, would result in income, yes.

Q. And in net worth the same way?

A. They would appear as an adjustment to the increase in net worth, yes, sir.

The Court: In other words, there would be a balancing?

The Witness: Yes, after the increase had been determined we increased it.

Q. (By Mr. Crittenden): That is an assumption that there were no gambling winnings?

A. It was more than just an assumption. We made every effort to verify any gambling, wrote

(Testimony of Paul W. Tormey.)

letters to every person Mrs. O'Connor named as having won money to her or lost money to her and so far as I know, nobody was ever able to verify any of her gambling moneys.

Q. I now show you this discrepancy evidence which is exhibited in evidence, exhibiting \$680.00 gambling winnings [309] and \$61.47 as either gambling or collecting something.

A. You can very readily establish that that is in the handwriting of the taxpayer's attorney, Mr. Maurice Hyman, and is his own itemization of what the taxpayer chose to tell him about that money. We have no reason to believe that was gambling winnings, except the taxpayer's own self-declaration.

The Court: In other words, you didn't use it?

The Witness: We didn't use it.

The Court: All right.

Q. (By Mr. Crittenden): In your net worth statement how much of the physical assets did you consider were exhausted in that accounting period in the form of depreciation or obsolescence or any other matter and would it be reinvested in another form, having been used in the business?

A. For the purpose of our computations, all of the assets taken on to the net worth statement appear at their cost value and the only ones who are adjusted for are those on which depreciation is authorized by law, being the building and the fixtures and for those proper depreciation reserves were set up for each year.

(Testimony of Paul W. Tormey.)

Q. Did you answer how much the items were and what they were?

A. Yes, sir. Well, on line 48, depreciation in business. [310]

The Court: Line 48 of what?

The Witness: Exhibit L, being the——

The Court: All right. Exhibit L, line 48.

The Witness: It shows the adjustment for the depreciation in business for \$39.00 in 1942; \$7.00 in 1943 and \$103.65 in 1944 for a total of \$220.65. It shows for 1943 on line 48, "depreciation in building, \$120.00; 1944, \$480.00; total \$600.00."

Q. (By Mr. Crittenden): Those are the total amounts of complete depreciation that you have filled out? A. That is correct.

Q. Now, can you give me the amount, total amount of money which you found had been expended or as you would have called corrected business receipts during the year 1944 for Mrs. O'Connor? You have a computation there of all the moneys that you found went through her bank account or paid out by check or cash in any way?

A. The question is quite complex, but I think I can answer it there. Do you have those detailed Application of Funds statements?

Q. You have them in your worksheets, haven't you, where you total up the amount that went through the banks?

A. You want to know what the corrected income was that went through the bank? [311]

(Testimony of Paul W. Tormey.)

Q. Let's take the corrected income that would reflect the amount that went through her hands?

Mr. Marcussen: Are you computing anything such as corrected income on these schedules?

The Witness: Yes, we testified this morning her adjusted net income.

Q. (By Mr. Crittenden): All right, will you give me the amount?

A. That will not be responsive to his question. He wants the total amount of something and this is the adjusted net income.

Mr. Marcussen: Give him the net worth. Do you want the net worth?

Mr. Crittenden: No, I don't want the depreciation taken off there. I want the items there as business income.

Mr. Marcussen: Define business income.

Mr. Crittenden: The amount of money you found that she had in her hands either through the analysis of the bank statement or the disbursements shown in the books or your audit?

The Witness: Her deposits for 1942 after giving allowance for returned items in it?

Q. (By Mr. Crittenden): I want '44, if you have it?

A. I thought you wanted it for all the years. In 1944 [312] Mrs. O'Connor deposits to the Bank of California after making allowance for a return deposit, taking adjustment of \$20.00 was \$38,232.89.

Q. May I have that sum again?

A. \$38,232.89.

(Testimony of Paul W. Tormey.)

Q. Have you the other sums that passed through her hands not by the bank?

A. She made cash disbursements of \$39,310.26.

Mr. Marcussen: What was that again, please?

The Witness: Wait a minute. That is the total for all three years. Excuse me. Could you correct the record on that? For the year 1944, her cash disbursements were \$13,684.24.

Q. (By Mr. Crittenden): Now, to arrive at the amount you would add the amount that went through the bank plus the cash disbursements and that would give you the total amount of moneys she received or expended at that time?

A. That isn't correct, Mr. Crittenden. We have explained that the deficiencies herein are calculated on an Application of Funds method. It has no connection with deposits to the bank necessarily. You are recalling the criminal trials in which the income was calculated on a cash disbursements and deposits method. They will bear a striking similarity, but they will not come out the same and in any event you would [313] have to add the amount of the gross receipts handled for her by Mr. Hyman in the apartments and take into consideration the amount of the expenses paid for her by him and any transfers back and forth.

Q. Now, you start with a bank balance of \$38,232.89 on cash disbursements?

A. \$13,684.24.

Q. Then you have to adjust from that the Hyman transactions?

(Testimony of Paul W. Tormey.)

A. I didn't make my calculations that way, Mr. Crittenden. You asked for the deposits and I gave them to you.

Q. I understood you computed this originally by analyzing the bank deposits and disbursements that were made, not through the bank, but by cash. You would add the two together and that would give you the amount of money that was disbursed through her hands?

A. For the purposes of the criminal trial, the gross business income was determined that way.

Mr. Marcussen: The deficiency notice, the income in the deficiency notice was not computed that way?

The Witness: No. Computed on the Application and Sources Funds statement.

Q. (By Mr. Crittenden): Now, this computation that you have is the amount of money or cash in the bank and we would have to correct that [314] with the amount that was obtained and handled through the real property to adjust it to that other method that you have there?

A. That is right.

Mr. Marcussen: I object to that as putting words in the witness' mouth. He testified he didn't use any such method and if Mr. Crittenden has a method, he can put it on by competent evidence. This witness has made clear he made no such computation and what Counsel is attempting to do is lay a ground for impeaching him on some testimony that is before your Honor and appears in

(Testimony of Paul W. Tormey.)

this record given by this witness and the witness Krause in the criminal trial and this witness has testified that the method of computation for purposes of the criminal trial was entirely different.

Mr. Crittenden: Now, I have several days of examination. I don't want to go through those again and I am trying to see how we can tie those in and save the trouble of going through it again.

The Court: We are not going through that, if it is like what we have been going through.

Mr. Crittenden: I don't want to go through it.

The Court: Now, I will say this about the argument of the Counsel over there. I hear what the witness has said and I have heard his testimony about how this is set up. I have followed it fairly well, I think, under his method. [315] I haven't tried to carry all those figures—it would be impossible—but I followed that through. Now, I don't know what Mr. Crittenden is going to set up as his contention of what does show as the correct income at all. Now, he has asked the witness for certain figures. Now, this witness knows what he did. He knows how they are. He indicates rather a thorough familiarity with the situation. The questions can be asked. This is cross examination. If he has the figures that Counsel is asking for, he can give them. If he doesn't have them, why, then he can say so. If he doesn't understand what this Counsel is after, he can say that and I think he has done that.

(Testimony of Paul W. Tormey.)

Mr. Marcussen: Very well. I will withdraw the objection, your Honor.

The Court: So, the witness will give due regard and attention to the questions and then we will let him give his answer, if he has it. If he doesn't, why, he can say so. All right, read the question.

Mr. Crittenden: Let me withdraw this question.

The Court: All right, withdraw it.

Q. (By Mr. Crittenden): You remember you testified as to the amount of the corrected business receipts for each of the calendar years on the District Court trials. How do they compare and can they be compared with these figures you have been testifying [316] to here?

A. I think they can be compared all right. I have made some comparisons.

Q. Will you show me how you compare the comparisons and compare what is the differences we have between them?

A. I don't have the comparisons between the ninety-day letter and either of the trials. I have a comparison made with the cash disbursement and deposit method of determining income, if you would like to see that.

Q. I take it, it was your from your audit from the figures you testified were used in making this ninety-day letter, was it?

A. That is correct.

The Court: That has been pretty carefully followed here from his sheets here and on direct.

Mr. Crittenden: That is right.

(Testimony of Paul W. Tormey.)

Q. (By Mr. Crittenden): Now, there was various testimony that was gone into in the District Court Trials as to the corrected business income. Was that the same item as you gave here as net income? A. No, of course not.

Q. Well, now, let's see what was different from it? A. To review it just briefly——

Mr. Marcussen: Would you like to be shown what [317] statement you made in the District Court for the net income? Do you have it in mind?

The Witness: I have it in my working papers, but it isn't——

The Court: Let the witness answer.

Mr. Marcussen : Very well, if he can answer it, he will answer it.

The Witness: This morning, by the Application of Funds method, we introduced our evidence as to the additional business income because all of this unidentified income was added to the taxpayer's business receipts; so, that was one stage and that is all shown on Exhibit "J".

Mr. Marcussen: Do you want to refer to the amounts, Counsel?

The Court: Let the witness answer this. Now, this Counsel is doing the questioning. If he wants amounts read, he will say so. Just leave him alone.

The Witness: So, on Exhibit "K", we come down to the total receipts item which appears on line 17 and you will see that the income business receipts, as disclosed by the return, have been in each year increased by the amount of that uniden-

(Testimony of Paul W. Tormey.)

tified income from Exhibit "K", \$7,214.13; in 1943, of '42, \$17,821.99; in 1943, \$22,596.49.

The Court: In 1944?

The Witness: In '44, yes, sir. [318]

The Court: All right.

The Witness: Now, then, after adjustment to inventory, merchandise bought for sale, supplies and other costs, salaries and wages, taxes on business losses, bad debt, depreciation, rent, repairs and other expenses, you come down to your corrected business income and you can see the answer here on the schedule. Would you like me to read those?

Q. (By Mr. Crittenden): Go ahead and read them.

A. So that a corrected net profit from business for the year 1942 was \$6,032.77. The corrected for 1943 was \$22,224.22 and the corrected for 1944 is \$30,223.49. Now, that business income is only a portion of her adjusted net income which would include salaries from her husband, interest received, rental income and her statutory deductions and also in one year partnership income. So, when you asked me the question I had to explain that this Application of Funds method derived the amount of unreported business income. We transferred that to the business income and then proceeded to adjust the whole matter on the merits of the respective items.

Q. I have a worksheet there, showing corrected business income to which you referred when your

(Testimony of Paul W. Tormey.)

Counsel asked you that question, if you knew what I was referring to? A. Yes. [319]

Q. Will you open that up and show it to me?

A. It's in my brief case. May I get it?

Q. Yes.

A. That will be items that were testified to at the first criminal trial?

Q. Yes, and also at the second trial, too. You were asked questions on corrected business receipts?

A. I answered questions as to what I testified to at the time of the first trial. This isn't the right case.

Mr. Marcussen: Just stay where you are. We will get it for you.

The Witness: It has my initials on it.

Q. (By Mr. Crittenden): You have there corrected——

A. No, that is the tax item. You don't want that.

Q. I want the corrected business income for the year 1944. In that you deducted corrected business expenses to arrive at the business income?

A. I will come to it in a minute. Here is a memorandum made of what I testified to. How would that be?

Q. Well, let's get the computation and compare it with 1944. Is it corrected gross?

A. It's just about the same. The bank—this is reading from my memorandum of my testimony of 1944 which should be in the record in the second trial. [320]

(Testimony of Paul W. Tormey.)

Q. That is right.

A. Bank deposits plus cash expenditures were \$50,343.45.

Q. Now, let's take 1944 here and see where the figure, where the gross receipts of the business are?

Mr. Marcussen: Let the record show that you are referring to Exhibit "J".

A. It won't appear there.

Mr. Marcussen: Why won't it appear there, Mr. Tormey?

The Witness: Because this was prepared on the Application of Funds method and we only used the balance remaining in the bank department at the end of the year as the funds applied and the balance at the beginning of the year is the source of funds.

Q. (By Mr. Crittenden): Now, here is the total receipts under business?

A. 1944 corrected. It shows \$53,948.97.

Q. What was the figure you gave?

Mr. Marcussen: You are referring to column on Exhibit "K" under the heading "Total Receipts?"

A. \$53,948.97 and the bank deposits plus cash disbursements that were used for purposes of this trial is \$50,343.45.

Q. Now, this is a difference there of about \$3,600.00?

A. Well, I can give you just an opinion. I have never [321] made the comparison. There isn't necessarily any relationship between the deposits used for this method. It may or may not include all of

(Testimony of Paul W. Tormey.)

the actual deposits to her Morris Plan account. I think for the purpose of the criminal trial they reduced them by every possibility of a transfer by the entire partnership income that might have gone into her deposits, all sorts of adjustments, so that there wouldn't be any possibility of offending the taxpayer.

Q. Now, will you give me corrected business receipts for the year 1943 that you testified to as comparable for the same period in your cash audit?

A. These are corrected business receipts. The figure I will give you will be deposits plus disbursements.

Q. All right, deposits plus disbursements.

A. \$44,187.65. That was Tormey's testimony at the trial.

Q. And here it shows total receipts for the year 1943 of \$48,064.67. Why is there a difference between this figure in Exhibit "K" on line 17 under column 5 and this figure which you have given me here?

A. Well, there can be a lot of reasons. You don't make up your income tax returns on the basis of your bank deposits and cash expenditures, Mr. Crittenden. You make it up on the basis of what the books showed as receipts and in this case, the corrected business income is what she spent, not what [322] she put in the bank. Where she spent from all sources, whether it went through the bank or not.

(Testimony of Paul W. Tormey.)

Q. Doesn't this include through all sources in 1943 or '44?

A. It probably doesn't have any connection with the income or expense out at the Baker Street apartments, for example, it doesn't take into consideration any of those.

Q. Rents are a second column above that, aren't they, or do I misunderstand you? Now explain this to me?

A. This figure having been derived from a detailed source and Application of Funds statement would include every item of expenditure which is in evidence there of either cash or credit. It's used to increase an asset or decrease a liability. All right, this figure of bank deposits is restricted, as I recall it, to simply her commercial bank account deposits.

Q. This covers all bank deposits plus expenditures?

A. It may not have it. Let's see if I can find the detail of it. I have got it some place, but it wouldn't necessarily have all of her income such as the Application of Funds statement did have.

Mr. Crittenden: Your Honor, if I could put these in evidence—in short if you could let me write my brief on this, it will save some time.

The Court: I don't know what you are putting in the [323] record.

Mr. Crittenden: I want to know if his work sheets that we are inquiring about—I think we can answer a lot of problems.

The Court: Maybe it will.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: Just the work sheets in evidence and let me work through them.

The Witness: These aren't my work sheets. They belong to the Penal Division.

Mr. Marcussen: I object to putting those in because it will be cluttering the record.

Mr. Crittenden: It's going to save a lot of time because, if I don't, I have got to ask him questions.

The Court: It isn't going to save me time. Then I will have to make an audit myself.

Mr. Marcussen: If your Honor please——

The Court: And I am not in the auditing business.

Mr. Marcussen: And in addition, if your Honor please, the Accountant, Mr. Nettle, to whom Counsel has referred, is sitting now in the courtroom and the purpose is merely to take all these audit papers and then have him make them available to Mr. Nettle, who is sitting here and then make an argument based upon that. I submit, if your Honor please, that if Counsel wishes to refute these statements, he should have had Mr. Nettle there through the entire [324] trial and then put Mr. Nettle on to point out the errors that Counsel himself doesn't understand and Counsel for the Government would have an opportunity to cross examine Mr. Nettle.

* * * * * [325]

[Note: Here follows a protracted colloquy between counsel for the petitioner and the presiding Tax Court Judge relative to the former's request and insistence upon putting into the

(Testimony of Paul W. Tormey.)

record, over the objection of Government counsel, all the voluminous detailed working papers, worksheets, audit papers, etc., made up and used by the Commissioner's special intelligence revenue agents upon investigating the taxpayer's case; and the Tax Court's denial thereof and sustaining the objection of the Government counsel, principally on the ground of Petitioner's counsel's lack of adequate preparation of his case, as stated by the presiding judge. Thus, the following are submitted as examples:]

* * * * *

The Court: Now, Mr. Crittenden, I will hear you?

Mr. Crittenden: No accountant is any better than his figures that go to make it up. These are where the figures are I am going to show in my brief, where a lot of things I can show are. I can show what this is like and I want to put it in the brief and I can spent a lot of time——

The Court: The Court is not going to be burdened in going through worksheets and notations in that manner. Now, you were giving those results. You know what your client had, so far as any records and so forth are concerned. You knew generally what the setup was because you had been through it and in the criminal trial insofar as the operations of the business were concerned. You also were aware of the apartment properties. You knew of the Morris Plan Bank handling and you make

(Testimony of Paul W. Tormey.)

no move to procure those matters, if they were needed for the purpose of proceeding and showing what the actual operations of this Petitioner were prior to this trial. What you want to do now is very obviously what should have been done before this trial and this Court is not going to indulge in an auditing of a group of worksheets or testing and checking an audit that is made in the course of the preparation of a brief. So, I am going to sustain the objection on that. Now, I will say this further: I have [327] listened to your cross examination with respect to those work sheets for the purpose of showing that they were glaring errors in there and I haven't heard any. I haven't heard any. As a matter of fact, the testimony that has been adduced here on cross examination has shown, with respect to most of the items, very obviously that where there were cases of doubt, the adjustments have been made in favor of this Petitioner, so far as the cross examination shows and that would have to be the basis of justification, then, for the putting in of these worksheets and going to such trouble of an audit in the case in connection with the filing of brief.

Mr. Crittenden: I may have made myself misunderstood. I thought I had proved on cross examination that this man had taken a particular column of figures which were not all the same as any of these figures and taken them and put them together and made this.

The Court: You haven't.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: I thought I had. I am going to take a lot of time in cross examining to show that has been done and I thought I could go through and show your Honor in a brief that some of them are outstanding, glaring examples rather than to take the time doing that.

The Court: Your cross examination hasn't demonstrated anything even approaching that. [328]

* * * * *

The Court: All right. That demonstrates the fact of what I am speaking of that when you go through a book like that and expect that sort of thing to demonstrate that these figures and results are wrong, you haven't done it; and when they come that close to it, considering the state of that book, it is a reasonable conclusion that those figures worked out over a period of time when they were screened very thoroughly and have been demonstrated on this cross examination of what is in that book.

Mr. Crittenden: Just take for example—I know what I am driving at on this thing. [339]

The Court: All right. Now, wait a minute. Wait a minute. I am not going to argue with you on that. I am not going to argue with you on that, so let's just end this and get on with the case. Now, you make up your mind what you want to show by the evidence of record and proceed to put it in and I am not going to argue with you about that any further. Let's get along with the case. Now, put in your evidence. Now, you have had your cross

(Testimony of Paul W. Tormey.)
examination here so far and I have followed it, the details of it. It is in the record and I will get at that when I come to considering your request for findings of fact and I will test your request against this evidence. But, I am taking evidence here now that you have prepared for your case and if you have any more cross examination of this witness, why, let's have it.

Mr. Crittenden: There will be no more cross examination.

* * * * *

Redirect Examination

Q. (By Mr. Marcussen): Now, Mr. Tormey, it is my understanding that these detailed working papers from which you have testified and which have not been admitted in evidence were prepared in the first instance by Mr. Krause and that further information was [340] obtained in the course of the audit by you and Mr. Krause and representatives from the Collector's Office and that that further information was obtained on the basis of checks with outside parties to audit the taxpayer's records and that you, thereafter, you or other representatives discussed those items with Mrs. O'Connor and ascertained certain adjustments that would have to be made to your original working papers and that those adjustments were thereafter included in those working papers that are the subject of conversation here, is that a correct statement?

A. Yes, that is quite correct. This is a case that originated with the Collector's Office. A Deputy

(Testimony of Paul W. Tormey.)

Collector was first assigned to assist Mr. Krause and some of the working papers were headed up and the distribution columns by this Deputy Collector and some of the figures put in by Mr. Krause. Some of them are completed by me. Then, after our staging of our first interviews with the client and going around to verify her purchases——

Q. Are you referring to Mrs. O'Connor when you say "the client?"

A. Yes, sir. After verification of certain matters with the Taxpayer, corrections were necessitated; so, in almost every year under review another set of supplementary schedules were made. Then at the later conferences with the taxpayer, later verifications with people like Lachman Bros. [341] and the liquor stores, other suppliers, we cautiously had to make still further corrections. So, in most of the years there are three complete sets of schedules which have the detail in them. In none of those years did we want to repeat the enormous amount of details, so we limited it to some form of getting those corrections on to the backs of schedules.

Q. Very well. Now, I think you testified that there was an overstatement on the taxpayer's returns of cost of goods sold in the amount of \$1,984.79 for the two and a half years covered by this audit, is that correct?

A. Can you repeat the figure for me.

Q. \$1,984.79.

A. That is the figure, \$1,984.79.

Q. That appears? A. On line 23.

(Testimony of Paul W. Tormey.)

Q. On line 23 of Exhibit "K" in column 12, does it not? A. Yes, sir.

Q. And it is the difference between the items shown in columns 10 and 11, is that correct?

A. Yes.

Q. Yes. Now, then, after you had testified to those, I believe Judge Turner, as the record will show, asked you whether that was the ending inventory at the end of the period and I think you said "yes", and do you wish to correct that answer? [342]

A. What I intended to say was that after giving effect to the actual pending inventory, it amounted to \$5,808.04.

The Court: Well, I think if you will refer back to the record when we get a transcript, you will find that my inquiry was directed to the \$5,000.00 because that is what I understand to be the inventory at the end of the two and a half year period.

The Witness: Then that would be my mistake. I didn't want there to be any doubt as to that.

The Court: I don't remember your other figure. I do remember the \$5,000.00 as being the inventory at the end of the two and a half year period.

Q. (By Mr. Marcussen): Now, then, you were interrogated about an item which appears in column 3 of your Source and Application of Funds statement which is an item in the amount of some \$985.00 for the husband's salary which you have in there?

(Testimony of Paul W. Tormey.)

A. \$965.00 appears on line 5 of Schedule of Exhibit "J", yes, sir.

Q. Exhibit "J". Very well, and that is for the year 1942, is it? A. Correct.

Q. And am I correct in the understanding that if that item were not included on this Schedule, it would actually result in a computation of an increased amount of additional [343] income by that amount, is not that correct?

A. That is quite correct.

Q. It does not have the effect of including in her income the \$985.00, does it?

A. \$965.00?

Q. Sixty-five, yes.

A. No, sir. It restricts the calculations of additional income and it has no bearing on the matter that the entire \$1,380.00, as earned by the husband had to be reported on the joint returns.

Q. And it is based on the assumption that all of the husband's salary to that extent was actually used by the Petitioner in her business?

A. That is correct, at least it was available to him.

The Court: And what is the net report of result of that insofar as the determination of income is concerned?

The Witness: The Government's determination is \$965.00 less than it might have been.

The Court: Yes. All right.

Q. (By Mr. Marcussen): Now, you were inter-

(Testimony of Paul W. Tormey.)

rogated about bonds, certain bonds embraced within Exhibit "B", I think?

The Court: Just a moment, before you get to that. In other words, is this correct: If you assume that he took that amount, the husband, out and spent it for his own [344] purposes, why, then the result is that she would have had, if you had given effect to that spending by him, she would have had that much more income?

The Witness: She would have had to have that much more income by this method to have done what she did and consequently her tax would be greater.

The Court: All right. I want to make sure that was the result.

Q. (By Mr. Marcussen): Now, referring to Exhibit "J", which is the statement of the Source and Application of Funds, I will ask you and also referring to bonds to which I have just adverted a moment ago prior to his Honor's question, can you tell me whether they are included in the statement of Source and Application of Funds for the year 1942? A. Not for 1942, no, sir.

Q. And can you tell me the reason why they don't appear there?

A. To our knowledge, there were not any purchased in 1942.

Q. Oh, I beg your pardon.

A. In 1943 they likewise do not.

Q. They do not appear in 1943?

A. No, although I had knowledge of the bonds

(Testimony of Paul W. Tormey.)

and had the numbers on at least two of them which were purchased [345] through her Morris Plan account, but the evidence of the taxpayer, confirmed by the Attorney who held the mortgage, was that these bonds were turned over to act as part of the purchase price of the Baker Street property. Therefore, having bought in 1943 and sold in 1943, they are in-and-out items which do not appear on this statement. The proceeds from them, however, are represented in the asset of the 2710 Baker Street property.

Mr. Marcussen: That is all.

The Court: Any further questions?

Recross Examination

Q. (By Mr. Crittenden): Mr. Krause made the first spread or just the spread of the first checks?

A. So far as I know they were made subsequently by Mr. Krause and Deputy Collector Ralph Moore and he may have been assisted by Mr. Washauer. At least, Mr. Krause will be able to tell you which ones he made.

Q. The ones you have in your hand, those ones you testified from, there is an original spread and you said some were in Mr. Krause's handwriting?

A. Some of them in Mr. Krause's handwriting I identified.

Q. Those were the spread of the checks?

A. For the particular month we were looking at. I can't tell you now whether all of them were in his writing. [346]

(Testimony of Paul W. Tormey.)

Q. Can you look now and tell me which is his work and which is your work?

The Court: Now, what is it you want him to look at?

Mr. Crittenden: The first spread for each of the years 1942, '43 and '44 of the checks and cash expenditures, the original spreads that were made.

The Court: The use of the term spread——

Mr. Crittenden: Well, worksheets where he spreads each one of the checks to the various columns or accounting terms.

The Court: Do you know what he is asking about?

The Witness: He seems to want to get the identity as to who made what, I don't know.

The Court: Well, see if you can tell him.

Q. (By Mr. Crittenden): Let's take the first ones that you first started with?

The Court: Now, first what?

Mr. Crittenden: He testified here on redirect examination that these accounts were first made up and two more were put on top of them where they were consolidated and corrected and adjusted and I want to find which was his first.

The Court: Well, do you have the worksheets segregated according to who made them?

The Witness: No, sir, except that I could——

The Court: Are all of your work sheets that you use for these purposes there?

The Witness: As respects the checks and cash disbursements, yes, sir.

(Testimony of Paul W. Tormey.)

The Court: Well, can you answer his question?

The Witness: I can answer his question generally.

The Court: All right, give him the best you can.

The Witness: The original listing of checks and cash disbursements for the year 1942 and '43 were done either by Ralph Moore or Mr. Krause and I did the most of the listing for 1944, as I recall it. I will look and see. No, I didn't do the original. Mr. Krause must have done this one.

The Court: Now, what is that?

The Witness: It is the first listing of the checks drawn by the taxpayer and checking them into her cash book, the brown book, in 1944, in so far as we could, and in each year there's one or two sheets like that for each month. Then I came along and made a shorter detail applying a restriction of some of those expenses which have been taken care of in testimony with the taxpayer and subsequent to that we summarized both of those sheets and then applied this detail to the final summary that was used for the purposes of building up your Source and Application of Funds statement which is here.

Q. (By Mr. Crittenden): Which is the top sheet you have here? [348] A. That is right.

Q. Marked a summary of disbursements as per the—— A. Taxpayer's cash book.

Q. This is what you mean by the second or third sheet that you made? A. That is right.

Q. You carried them across here under column

(Testimony of Paul W. Tormey.)

such as total amount of liquor, wine, beer, tobacco, food, personal drawings?

A. No, licenses and taxes.

Q. And utilities, wages, advertisements, general expenses, miscellaneous items and amount and under miscellaneous items, you have various ones broken down by name? A. That is right.

Q. Now, in the original spread, let's go back to one of those, as an example on the lefthand column, was broken down into the number——

A. Check number, that is the date, rather.

Q. The check number, the amount and on the right there are a number of columns headed "liquor, wines, beer, tobacco, food, etc.; food drugs, license and taxes?"

Mr. Marcussen: "Personal drawings," excuse me.

Q. (By Mr. Crittenden): Are license and taxes, utility, wages, advertising, miscellaneous and under that, explanation and amount and in [349] two columns on the left "explanation" and on the right is "amount" and on the bottom you have run a total of each of these columns except that is including the column of the checks? A. Why, of course.

Q. Now, these are the checks again on the left that I am turning to here. This is by a certain amount.

The Court: Now, those are amounts that are taken from her check book, I take it?

The Witness: They appear in the check book and in some of those instances in the bank book and he verified each one had a withdrawal from the

(Testimony of Paul W. Tormey.)

bank account itself. In fact, the checks themselves are in evidence.

The Court: Yes.

Q. (By Mr. Crittenden): Now, your analysis of your cash disbursements are on which sheet here? These are all checks, I take it?

A. The preliminary ones are put down here in combination of totals. I didn't do this work, but I understand it. They gathered those cash disbursed items together by a little scratch sheet and entered the totals of each classification here, you see.

Q. That means like for instance on the total disbursements, this is marked "date, 1944, July," and you have items here of check numbers from 77 down to 192, isn't it? There is a break here with some of them unnumbered. Then [350] underneath it you have the total of checks and the total, as you have spread them here, and under them you have written "Pabst?"

Mr. Marcussen: Just a minute, I don't think there was a record of Pabst.

Q. (By Mr. Crittenden): "Pabst, San Francisco Brewery", Bill and Luckey with the sums of each one of them and then, for instance, under amounts here you have \$1874.81—— A. 86c.

Q. Excuse me, and then carrying on to the right under liquor there is the sum of \$37.64 and under wine—— A. There is nothing.

Q. There is nothing.

You have listed the wines under "beer." Under

(Testimony of Paul W. Tormey.)

"tobacco" there are two figures, one of them the check totals. A. No, two items.

Q. \$55.60 and \$171.19. Then after that comes under "personal drawing", "party, \$25.00; food, \$17.25?" A. \$17.75.

Q. Excuse me, \$17.75. "Rose's insurance, \$20.00; Mam's something, \$100.00?"

A. Mam's train trip.

Q. Miscellaneous, \$21.50. Nothing under licenses and taxes, nothing under utilities. Under wages there is an [351] item of \$527.00 which appears to be under cash disbursed line?

A. That is right.

Q. A sum of \$384.60 under checks. Under cash item \$527.00. Under advertising——

Mr. Marcussen: Are you reading the paper into the record? May I ask what the purpose of this is?

The Court: Let him go ahead.

Q. (By Mr. Crittenden): Under advertising there is a cash item of \$23.75. Then under miscellaneous where it says "explanation" there is "paid Hyman on Baker Street, \$500.00." Auto expense, \$13.75; garbage, \$5.00; supplies \$48.07; laundry, \$3.81, and then at the very bottom there are totals of both the cash and the check payments for each one of the columns. No use reading those into the record. It's an arithmetical total. I take it most of the sheets are identical in the method in which they are handled like for instance under "miscellaneous", everything is explained and under "cash items" many of them have names opposite them like when

(Testimony of Paul W. Tormey.)

it is liquor and wine; but if it is under "wages", it's just a grand total, now, where you make a spread of the totals to which you were testifying before you made a second spread on this, didn't you?

A. Yes. On which year do you want it?

Q. Well, for instance, February of 1943—we started with which page? Does that start—Oh, that was the second [352] spread again?

A. It's in the middle here some place.

Q. Now, on this page to which you are referring in February of '43, in the middle of the page, those double lines above and below the date of February and after that, is that the date column, Mr. Tormey?

A. Yes, sir.

Q. I notice here that the dates are February 1, 2, 31, is that 31?

A. That is right.

Q. 31, 3, 15, 31 and 31. I take it something happened on the 31st day of February?

A. Get the book and I will show you what I mean.

Q. I am asking you if that is what this entry means?

The Court: Let him have the book.

Mr. Crittenden: All right.

A. Well, there doesn't appear to be any total in here now. They give evidence of having been rubbed out. In any event this 31 refers to this re-numbering of the days and the month.

Q. This date particularly in February over here?

(Testimony of Paul W. Tormey.)

A. There is no item "31" in February. If I put down "31", I was in a hurry and forgot about it. I am not very good on the calendar.

Q. Let it appear in the record there are five items [353] dated February 31, 1943.

A. I will show the principle of what is referred to, however. It refers to the fact that cash disbursements were entered in totals from the total column and they did appear on line 31 at one time on that book.

The Court: It is according to line?

The Witness: Yes, sir. The line number appearing on the end here.

The Court: In other words, that is to cover these erasures? They reflected these erasures, did they?

The Witness: They could have, sir. I am dealing with the corrections to the totals of some of these columns and they were written in there and then entered on this work sheet as spread in book, "personal, wages, miscellaneous." For example, that is February. Which one do you want?

Q. (By Mr. Crittenden): I am taking the first one here, February, \$317.00?

A. All right, under personal column, there is a \$7.01 item and an \$65 item under miscellaneous. Here it is, \$70.08 and insurance. The two together were down here in a total some place on the opposite line 31 where it would have been and then I spread those, to corrected items "personal, \$22.50 and \$65.00 to rent 581 Valencia."

(Testimony of Paul W. Tormey.)

The Court: Those represent line on the book?

The Witness: That is right, sir. [354]

Q. (By Mr. Crittenden): Now, you have March 31st?

A. It means the end of the month and the totals, Mr. Crittenden.

Q. You have entries made on the 31st day here? How did you carry those for March '43, the same way?

A. If there was occasion to correct the total of any of those columns from the spread as originally made in the other section that you have already gone over, we would put it down referring to the date. If it was a total—here is \$475.00 under “personal column.” It is no longer there. We had these—\$441.50 something. I can’t find it anyway. Here—no, that wouldn’t be it; but in any event, the principle is that this represented the total of the item as spread in the book. These two over here. Then it is separated by what it should be on here as “supplies”, column 12. Maybe we will find it. That was the \$45.94 according to the book and it’s actually \$44.49 and a \$400.00 error deduction from “personal expense” which we did and you can see where those errors are applied on the final summary sheets, if you are interested. Here, for example, “payments” that are in the book to Morris Plan, overstated, “\$720.00” or reduced from the accounting, \$720.00.

Q. Now, where is this February 1943 mistake of \$400.00 in the column? [355]

(Testimony of Paul W. Tormey.)

A. Well, it's—

The Court: You know, Mr. Crittenden, if you had been as zealous in taking the evidence in this Petitioner's information and data and worked at it from the standpoint of showing what her correct income was, why, then you would have had a sure fire way of showing whether or not that is wrong, but proceeding at it the way you are, you don't.

Mr. Crittenden: I just want to read this in the record, if I may.

The Court: What is it you are going to read into the record, now?

Mr. Crittenden: That February, '43.

The Court: It depends on whether or not I think it to be helpful whether or not I want it in there. Now, what is it you want in there?

Mr. Crittenden: I got one spread and I am putting in the second spread that we handled, February '43.

The Court: What do you mean "second spread?"

Mr. Crittenden: That is what he has done.

The Court: What are you talking about?

Mr. Crittenden: There are two pages that cover February 1943, so, for one of the, I have read and shown what is in the record. Secondly, I am picking it up here, which is the central part and dated the 31st day of February. We had four items of those. [356]

The Court: And for what purpose are you putting it in, Mr. Crittenden?

Mr. Crittenden: If I can, to protect my record.

(Testimony of Paul W. Tormey.)

The Court: In what way are you protecting your record?

Mr. Crittenden: He testified on redirect examination he had taken one set of figures and set them up. Then he had consolidated them with some corrections and put them in a second place and then he had set them up in a third place, two more on top of that, put it that way. Now, I am trying to show what he actually did when your Honor sees this.

The Court: Do you understand what he is talking about, Mr. Witness?

The Witness: I understand that he is attacking this thing on the possibility of error, but it is simply a step of three logical things. We first set down all the checks we could find and spread the cash disbursements on the business for our account as they are on the books. In the light of later events, he took those columns—we had found corrections had to be made. Instead of correcting our entire schedule, he set up that column, being some corrected deductions from the first schedule in addition, in the third column and when we got through making those corrections, we applied the schedule to the first schedule and came up with the base report of our audit. [357]

The Court: All right, Mr. Crittenden, how far are you going in this?

Mr. Crittenden: Just to make the February 1943——

The Court: You are just going to cover 1943?

(Testimony of Paul W. Tormey.)

Mr. Crittenden: That is all I am going to do. Now, show us the page of 31 days of February, 1943?

The Court: I will do my own construing about that, Mr. Crittenden. I have heard the witness and if there is any question about that, let's eliminate argumentative matters.

Mr. Crittenden: Your Honor, I have done everything to hasten this court trial and if I am a little slow on some of these things——

The Court: It isn't a question of that. Let's eliminate the argumentative and the adjectives and so forth. They are very effective other times with a jury, but it is just wasting time here to indulge in them because you don't have a jury here. So, let's just eliminate those and cover substance.

Q. (By Mr. Crittenden): Under this February item, there is 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 items that are spread in the first column, covering the date, the second column being headed "personal," the third being "wages" and the fourth being "miscellaneous." Then there is an item being "description" in the next column.

A. The next three columns. [358]

Q. Excuse me, the next three columns, but there are figures written to the left of it and the words to the right, for instance, like "February 1st" and "\$1.50, Galan Laundry." Then written on the left is "spread" and on the right, "should be" and under the "should be" it says "personal, wages, general expense?"

A. "Contract payable."

(Testimony of Paul W. Tormey.)

Q. "Contract payable", another description of "Galan" goes over here under the column of——

A. "General expenses."

Q. "General expense", "should be" \$1.50, the P.G.E. \$3.25 is carried under the column "personal" on the right and I notice there is an item of \$19.75 after P.G.E. and \$16.71 utilities?

A. You missed the theory of this. The point of this is that the check P.G.E., \$19.75 which appears in the description column appears on the first schedule as a charge to the taxpayer's personal account, to utilities, rather, and we find that only \$16.71 is applicable to utilities. Therefore, the difference, \$3.25, is put into her personal account. Do you follow me?

Q. I follow you. So, after the word "P.G.E." there is the figure with a 19.75-16——

A. Minus \$16.71.

Q. Then it says "utilities" and then under "should be"—— [359]

The Court: Now, just back up a little bit. Is it \$19 some cents and the \$16 some cents?

The Witness: Yes, sir.

Mr. Crittenden: He writes it. I don't think it is in any dollars and cents column.

The Court: You would have your dollars at the top and you know what it is, so we won't quibble over that as to the dollars and cents because that is what you have on that sheet?

The Witness: That is right.

(Testimony of Paul W. Tormey.)

The Court: All right. Let's say dollars. The reporter is having a hard enough time as it is.

Q. (By Mr. Crittenden): The next one is February 2 and it is under a spread "personal \$22.50" and then under "description" it says \$65.00?

A. Under "miscellaneous \$65.00" and the description——

Q. Oh, miscellaneous is \$65.00 and then the description follows as "Milton-Myers-rent."

A. Yes. Will you let me follow the book for you on this, Mr. Crittenden. You see, under column 13 in the black book for February, 1943, there is an item appearing of \$87.50, "rent for Tavern and Apartment 4." Down at the bottom of the page there is penciled in total of \$87.50. We allow that as identified by Milton-Myers-rent, the check portion of it \$65.00 and we allow the charge of the balance \$22.50, personal [360] Apartment 4, upstairs." Under column "other" there is \$65.00 and after that the words under "description," "rent-571 Valencia." The next is an item, date, February, 31, and it's under column "personal" for \$7.01 and then under "miscellaneous" \$65.00, under "description", "insurance;" then on the right where it should be is "personal, \$7.01" and under the column "other" \$65.00 and description under that, "fire insurance."

Q. Then we will just take the last item to save a lot of reading in here. February 31, under column of the "date" and under column as spread, showing "wages, \$315.00"; under "description" wages and under "should be"—it comes under the wage column

(Testimony of Paul W. Tormey.)

of \$315.00 with nothing under description. Now, your next and I should say there is a double line after that and in between are the totals of the columns on the left, and the columns on the right and the total showing the entire amount of these columns added up with an equal sign showing the total of all of these items, isn't that correct?

A. Each side per book. It might make it more apparent and understandable to show that the books or the previous classification of the books, I should say, had included \$540.96 as a personal expense of the taxpayer, \$315.00 as wages and \$603.16 of miscellaneous items for a total of \$1459.12. The re-determination assigned only \$140.21 as personal items. Wages were \$315.00, no change for some reason. General expense was \$73.91 and miscellaneous items which are detailed above, [361] \$930.00.

Q. Now, you have a third spread on top of this that you followed through that you show us on February of '43, the next page that follows this?

Mr. Marcussen: What month is that?

Mr. Crittenden: February of '43.

The Witness: Simply a summary sheet is all.

Q. (By Mr. Crittenden): Now, that shows on one page, which is the bottom half, marked "1943 Summary" and we will take February. Under the column marked "personal" is the amount of \$540.96. Under wages the sum of \$315.00 and under "miscellaneous", \$603.16. Then at the bottom there are also errors, a column, and then the net for 1943 shows the totals under "personal" and wages and

(Testimony of Paul W. Tormey.)

miscellaneous and then I see it equals which must be the addition of those three columns, isn't that correct, the total? A. Yes.

Q. Now, do you have any more spreads that go on top of that?

A. Those are redistributed on the righthand side.

Q. Under "should be" in February there are these columns: "140.21." Under "personal", wages \$315.00; general expense \$73.91. The column—what is that contracts? C-o-n-t. P-a-i-d. [362]

A. Contracts.

Q. That is blank. Under "other" there is the sum of \$930.00. Now, are there any more spreads or any additions or corrections of February, '43?

A. This "other" column is broken down by the details of it. There weren't enough columns, in other words, to subdivide on one schedule. Actually the total column for the year there, so far as this schedule of restrictions went, was \$6,558.65 and that is made up of the rent and accounting service, painting, insurance, bad checks, a total of \$999.00 of allowable business deductions. It also records the purchases of a piano, stove, ring at Brilliant's, ring at Maxford's, watch at Brilliants; rug and furniture at Lachman's and shrubs for the Baker Street property or capital assets purchased of \$2,218.64; shows the purchase of \$1,101.77 in bonds; \$200.00 Libery Loan; \$500.00 deposit to the William Lewis Liquor Company and \$33.00 for the music change fund; total of \$1834.77 cash or equal. It includes

(Testimony of Paul W. Tormey.)

item marked "gambling, \$2265.90," labeled gambling with a question mark after it; \$795.64 labeled "loans" with a question mark after it; \$444.50 labeled "donations" with a question mark after it. Those last three items totaling \$1,506.24 to be determined the total, as previously given, of all of these items was \$6,558.65 as respects that total. Now, if you want to follow this through, those items were—— [363]

The Court: Are you still on February of '43?

Mr. Crittenden: Yes. We are referring to February '43 items.

The Witness: This was the effect on the change of February '43 items on the total of the items in that column for the summary of the year.

The Court: That is the reason I asked the question. You are on February of '43?

The Witness: That is correct.

Q. (By Mr. Crittenden): All I am interested in finding out is how you take this spread for February '43 and carry it through on your adjustments?

A. I guess that is all there was for '43.

The Court: Now, let me make a suggestion to you for the purposes of your case and the benefit of your client. You had better use a little bit of diligence here in working out what she actually had and where it went and what her income was.

Mr. Crittenden: That is all in the record.

The Court: And then you would be getting somewhere, whereas I can't see that you are here.

(Testimony of Paul W. Tormey.)

Mr. Crittenden: Pages and pages and pages of testimony that are before your Honor that I don't want to read them to you now. [364]

The Court: Why bother with this if you have actually in the record what she actually made and what her income is as evidence of it. All you have to do is argue it on brief. I don't have to have all this matter here being dragged in because your results, if you have got in here a showing of what her income was and what her expenses were, why, that in and of itself, when laid alongside of the results in Exhibit "J" and "K", will supply all the basis that you need for making your argument and that will supply all the basis you need for your conclusion if it is wrong, but go ahead.

Mr. Crittenden: He was asked questions on direct——

The Court: He was asked on redirect how he arrived at these things and who arrived at them and if it was a composite of various things that are there and other adjustments and he so answered. All right, let's get along.

Q. (By Mr. Crittenden): We have all of February '43 out of the way, the different spreads you were referring to before and the corrections and adjustments that you testified to on redirect examination?

A. Are you asking me a question?

Q. Yes.

A. I have no more sheets on it that I can find.

Mr. Crittenden: All right, that is all. [365]

(Testimony of Paul W. Tormey.)

Mr. Marcussen: I have one question, if your Honor please.

Redirect Examination

Q. (By Mr. Marcussen): Do you know, Mr. Tormey, whether a liquor license is required on an apartment establishment such as Mrs. O'Connor was operating during the taxable years involved here? A. I understand so, yes, sir.

Q. Do you know whether they have any value in the State of California?

Mr. Crittenden: I will ask that the witness be qualified.

Mr. Marcussen: I am not qualifying. I am asking if he knows whether they have any value?

A. I know of my personal knowledge they have a going concern value which depends on what you can get for it. They also have a statutory value determined on the license rate which is \$525.00 a year. I know the taxpayer——

The Court: Just a moment——

Q. (By Mr. Marcussen): Do you know whether in the State of California they exchange hands for substantial sums of money?

A. I know it's common knowledge that it does. I haven't any way of proving it, except other cases I have investigated and could refer to the files in those cases. [366]

Q. And do you know of what the value of a liquor license was, say, in 1944?

Mr. Crittenden: We will move that any questions as to this be restricted to the man's knowledge

(Testimony of Paul W. Tormey.)

and if it isn't in his knowledge, we not waste the time of the Court.

The Court: Read the question.

(Question read.)

The Court: What do you mean by that, Mr. Marcussen? I wouldn't know just what you are asking there.

Mr. Marcussen: Well, the taxpayer has purchased the full interest in this bar——

The Court: And I assume that I am talking about your question now.

Mr. Marcussen: I want to find out what was the value—I should say, in 1943—I beg your pardon. I want to find out what the value is so as to give some clue of how much, if any, of the \$615.00 which she paid for the remaining half interest and how much, if any, of the first \$1000.00 she paid for the first half interest might be reasonably allocated?

The Court: All right. I will sustain the objection on that question because he has shown what he did and I have no—there isn't anything here to indicate that this man——

Mr. Marcussen: Very well. It is not part of my burden of proof. With that, I will withdraw the question. [367]

The Court: If you needed to prove that or wanted to show it, why, there would probably be some ways, but I don't find anything from this witness to show he knows anything more about it than the fact he has worked on some cases where

(Testimony of Paul W. Tormey.)

there were some transactions, but I wouldn't consider that as qualifying. Objection sustained.

Mr. Marcussen: That is all, your Honor. * * * * *

CLARENCE L. KRAUSE

resumed his testimony as follows:

Cross Examination

Q. (By Mr. Crittenden): Mr. Krause, you are with the Intelligence Unit and will you describe your job?

A. I am with the Intelligence Unit of the Bureau of Internal Revenue.

Q. You had occasion to make an audit in this case for the second trial?

A. For the second criminal trial, yes.

Q. You have with you the worksheets that cover that particular period of Mrs. O'Connor from 1942 through 1944?

A. I have my worksheets that I used in the second criminal trial for those years, yes.

Q. Now, this is solely informative for the Court. It appears in the record before him which he has not read. You made an entire reaudit of all the accounts and checks and all those records that were in the evidence in the first trial for the second trial, didn't you?

A. I made an entirely new audit from the original [377] basic records.

Q. Now, will you give me from your audit the business expenses for the period from 1942 from the time Mrs. O'Connor took over the business as an

(Testimony of Clarence L. Krause.)

individual, which was the 16th day of July, 1942, to the end of 1942?

A. Merchandise purchased, not considering inventories, \$9,631.86. Wages paid——

The Court: That is for what period?

The Witness: This is for the period of July 16, 1942 to December 31, 1942.

The Court: All right.

The Witness: Wages paid, \$2018.20. Business taxes paid, \$916.81. Supplies purchased, \$306.49. Miscellaneous bar expenses paid, \$1,340.68; gambling losses paid, \$167.50; bad debts, \$42.50; automobile expenses, \$133.10; depreciation automobile, \$339.20; depreciation bar fixtures, \$320.00; total, \$15,216.34.

Q. (By Mr. Crittenden): Now, you computed your business income for the same period for the bar business expense. Will you tell your Honor how you did that?

The Court: What do you mean expense of the business?

Mr. Crittenden: Receipts of the business.

The Witness: You mean for the bar?

Mr. Crittenden: That is right. [378]

The Witness: Yes. I computed your corrected business receipts for the same period. I computed that by taking the taxpayer's bank deposits, net bank deposits after eliminating transfers, redeposits, loans and so forth and adding to that the cash payouts as differentiated from check payouts.

(Testimony of Clarence L. Krause.)

Q. (By Mr. Crittenden): Will you give me the amount of that?

A. The total that I got from the computation was \$15,388.47.

Q. What is the difference between that and expense by your computation?

A. My corrected business income for that period of \$172.13.

Q. Now, was there any income from real property, other income? A. Yes, there was.

Q. Will you give that?

A. We show the salaries received, \$1380.00; Morris Plan Thrift Account interest, \$22.44 and net rental income of \$217.47.

Q. Can you give me the total of that?

A. Total of that would be \$1,619.91.

Q. Was the rental income in there?

A. Yes, rental income was \$217.47. [379]

Q. Did you set up depreciation?

A. Yes, depreciation.

Q. Will you give it to the Court?

A. You want the details?

Q. The details of depreciation?

A. The rent schedule shows rent received, \$303.00, rental expenses of \$50.38; rental furniture depreciation, \$35.15, making a net rental income \$217.47.

Q. Now, Mr. Krause, I will appreciate the Honor states that an account is no better than the items that go into it.

The Court: Who said that?

(Testimony of Clarence L. Krause.)

Mr. Crittenden: Well, excuse me, I thought—we were discussing that earlier when we were saying an account was no better than what goes into it——

The Court: What did you say? You said I said that?

Mr. Crittenden: We were discussing that. Someone said it.

Mr. Marcussen: That is the type of thing that goes in this record.

The Court: Don't you undertake to put words in my mouth. You ask your questions.

Q. (By Mr. Crittenden): Now, do you have sheets showing how you arrived at those deductions and what items go into it?

A. Yes, I do. [380]

Q. Can you show me how it is set up there?

The Court: Now, that sort of thing, Mr. Crittenden, hurts your own case.

Mr. Crittenden: I am sorry, your Honor.

Q. (By Mr. Crittenden): You have columns here showing the deductions that you took and how you arrived at it?

A. I have entire worksheets here. First of all I have listed the checks, disbursements made by check by months.

Q. Are they listed by name and amount?

A. Listed by date, by name, by amount and classified.

Q. And classified?

A. And after that I listed the disbursements made in cash, likewise classified.

(Testimony of Clarence L. Krause.)

Q. And totaled and then grand totaled by each item as they appear in the book or account. Give us an example, will you?

A. I have them listed by dates as they are exactly shown in the book and then I have totaled them by months as to those expenditures in cash, those expenditures in check and then they are totaled together for the entire month. I also have photostats of the book itself with a key shown on the photostat of the book in which the key shows exactly each item shown in the book whether it's been allowed or disallowed, whether it's been found to be paid by cash, whether it's been [381] found to be paid by check. The entire matter is summarized for the total.

Mr. Crittenden: Now, your Honor, I will want to show the items that go into this deduction. That can be done in several ways. I am suggesting, in order to save time, could I have photographs made at my expense of these items of the check and the cash expense to total up to this amount and then put those into evidence instead of putting in the sheets?

The Court: He wouldn't know the answer to that.

Mr. Crittenden: I am asking his Honor if I can.

The Court: I really don't know. You will have to make your own decision. I don't know anything about it.

Mr. Crittenden: We will take each sheet by the month then and will you identify the sheet by the

(Testimony of Clarence L. Krause.)

month, how you made these up, starting in July of 1942?

The Court: Now, what are those sheets he is asking you about, Mr. Witness?

The Witness: These are fourteen-column accounting sheets in which I have listed all the disbursements for the cash, whether cash or whether check and then I have classified them as to the various types.

The Court: Where did you get those disbursements?

The Witness: I got them from the books or from the taxpayer's checks.

The Court: In other words, what you have there [382] you made up solely from what books?

The Witness: From the taxpayer's black book.

The Court: The black book and checks?

The Witness: From the taxpayer's checks.

The Court: Nothing else?

The Witness: Not a thing else on these particular sheets, no, your Honor.

The Court: Now, do I understand that all of those matters are in the record, the checks and the books?

Mr. Crittenden: These and these total them and it saves me the trouble of doing it in a brief and it is done neatly and nicely and I want to put them in this form.

The Court: Make your offer if that is what you want.

Mr. Crittenden: May I have the sheet of 1942?

(Testimony of Clarence L. Krause.)

The Court: Don't tear anything out of there. You want to offer the sheet of 1942?

Mr. Crittenden: July through December. I am starting with July now.

The Court: Oh, all right. You have those sheets.

The Witness: July consists of three pages and the totals for the half month July 16-31. Do you want the figures?

Mr. Crittenden: Well, I thought we could use the sheets themselves now.

Mr. Marcussen: You mean you are offering these sheets in evidence? [383]

Mr. Crittenden: Yes.

Mr. Marcussen: I will object to the offering of the sheets in evidence.

The Court: Let me ask you again, Mr. Witness, do I understand from you that this is a tabulation that you made from the books, this black book that is in evidence and from the checks and check stubs or the checks? Just tell me again exactly what you have got in there?

The Witness: Sure. My source of information was the taxpayer's checks and the black book.

The Court: That is all?

The Witness: That is all. I compared the checks to the items in the black book to ascertain——

The Court: And those are in evidence?

The Witness: Yes, sir.

The Court: All right, the objection sustained.

Mr. Crittenden: It saves the trouble of a computation. I will have to read these in the record.

(Testimony of Clarence L. Krause.)

The Court: You won't have to do any such thing. Your basic records are in evidence. All this is is a tabulation of those things?

Mr. Crittenden: That is right.

The Court: And you can make your own tabulation on that just the same as anybody else and we already have the testimony that this determination here was not made from those. [384] It is a composite of things and I am not going to try to reconcile that, Mr. Crittenden.

Mr. Crittenden: I asked the specific question of Mr. Tormey if all the information he had compiled, the basic matter was in the evidence and he said yes.

Mr. Marcussen: Mr. Tormey, yes.

Mr. Crittenden: Mr. Tormey did. Now, this is the basic evidence, only it's added up and comes to an entirely different result.

The Court: That is his tabulation of it that he made. The evidence is over here.

Mr. Crittenden: That is right. Now, that is all the value of an accountant's testimony at the most is what it contains and how he adds these factual matters together to arrive at a particular sum.

The Court: That is not the determination. It is a part of it.

Mr. Crittenden: It is entirely different than the evidence that was given before.

The Court: Sure, but whatever there is in there, to test the difference you have got it in the record, in the black book and in your checks.

(Testimony of Clarence L. Krause.)

Mr. Crittenden: That is right and here they are all tabulated.

The Court: That is right. All right, that is not [385] competent evidence over the objection of opposing Counsel and that would mean I am going to have to do some auditing and I am not from secondary evidence. I am just not going to do it, Mr. Crittenden.

Mr. Crittenden: This isn't auditing from secondary evidence.

The Court: It is. That is secondary right there; that is what it is. All it is are figures that he says he has taken from original competent evidence that is in the record.

Mr. Crittenden: That is the same thing Mr. Tormey did only he has an entirely different result.

The Court: Mr. Crittenden, all under the sun Mr. Tormey's evidence was is to show for the benefit of this Court the manner in which he arrived at the amounts that went into that determination. They are not even proof of the correctness of the determination.

Mr. Crittenden: I am showing your Honor what the correctness would be if properly added together.

The Court: All right. I don't want to take it from that. Make your determination. That further allows you a margin of error.

Mr. Marcussen: In favor of the taxpayer.

The Court: I don't know. It might be in favor of the Government so far as I am concerned. If it was in favor [386] of the Government, the ruling

(Testimony of Clarence L. Krause.)

would be exactly the same. I don't know now in whose favor it is in. It is not competent evidence and I am not going to take it, particularly when the competent evidence is in the record.

Mr. Crittenden: Suppose I had brought an amount and said I looked at these books and came up with this total. That would have been competent evidence? So much was expense and so much was income?

The Court: It might.

Mr. Crittenden: That is what I am doing here.

Mr. Marcussen: I am not willing that that should be released to Counsel.

The Court: I am not going to take it.

Mr. Marcussen: I will have to deny it.

The Court: I want to know what those records are.

Mr. Crittenden: You don't intend to audit them, I take it?

The Court: I am going to do enough to satisfy myself as to what they show.

Mr. Crittenden: Here is an example where it has all been done to save your Honor the trouble. Maybe I misunderstood.

The Court: You apparently do not understand, Mr. Crittenden, what I have been saying. You have got your evidence in the record. You have a part of it. You have a tabulation that has been made by this witness of part of the evidence and [387] this evidence is the correct controlling evidence so far as any determination is concerned. That is, it is com-

(Testimony of Clarence L. Krause.)

petent and here you have this witness' tabulation that he made up for another purpose, which may or may not understandably tie in with the determination. Now, the point I have been trying to tell you all evening is that if you had prepared your case, you would have taken the evidence at hand; you would have had a determination from that made as to what the correct amount of the income is and then you could have put that alongside of this determination and to the extent that it differed and it was tied in with the evidence here, why, then I could have seen it at once.

Mr. Crittenden: Isn't it the testimony that does that, your Honor? Do I understand that the Government's computations are prima facie evidence of that fact. The moment I introduce a book that has different results that can be obtained from it, then I have evidence on which the Court may make its own determination. I may bring in a number of books, receipts or expenditures or checks, which I have done. Then I put on secondary evidence to assist the Court in using that in arriving at a different figure.

The Court: That will not assist me in arriving at what you are talking about because it is a different audit from the one on which this determination is based. I allowed that testimony in only for the purpose of explanation as to how it [388] is set up, not for the truth or correctness of the figures therein stated. I don't know whether they are right or not.

(Testimony of Clarence L. Krause.)

Mr. Crittenden: I don't assume your Honor is going through there and set up every check on a spread and make his computation from this evidence.

The Court: You can assume or not assume what I am going to do in my study of the evidence in the determination of the facts in this case, because that is my job and I propose to do it.

Mr. Crittenden: Well, I realize that, but you would be at this thing for months, I would say, if you had to do that. [389]

* * * * *

The Court: You mean it is going to save you a lot of work if you can get that accepted as being evidence of facts in this case.

Mr. Crittenden: No. The evidence of facts are the books and the account and the testimony of the witnesses as to what each item was and there are pages and pages of that testimony.

The Court: Over objection the documents are not admitted.

Mr. Crittenden: I can see your Honor's position. The only thing left for me to do is start reading these things.

The Court: You are not going to read them from there because I am ruling that out. All under the sun that is is secondary stuff that somebody has used for some purpose. The original evidence, the competent evidence according to your own statement is over there. [393]

* * * * *

(Testimony of Clarence L. Krause.)

Mr. Crittenden: Well, let's take an example.

The Court: You don't know of any examples. You have gone over it.

Mr. Crittenden: You mean to say your Honor is ruling that it is impossible for me to go ahead and examine as to what items Mr. Krause has put in here to arrive at these different figures on which he has testified?

The Court: Mr. Crittenden, Mr. Krause's audit is not the basis of the determination of the Commissioner in this case that is on trial before me. Now, if it were, the work of an agent would be admissible here for one purpose and one purpose alone and that is to show how the determination was arrived at, not as proof of any of the facts contained therein.

Mr. Crittenden: That is true and just what weight your Honor should give to it when you say that.

The Court: Well, that doesn't help you one iota, Mr. Crittenden. It is up to you to show wherein it is wrong, not from somebody else's listing of these secondarily, but by basic evidence. [396]

* * * * *

Mr. Crittenden: I appreciate that, but I don't want to go to the trouble when it is all tabulated here and assist the Court on this.

The Court: That is exactly the point. You don't want to prepare your case. You want to fool around here with picking away here and there on some figure that is not proof of the fact.

(Testimony of Clarence L. Krause.)

Mr. Crittenden: The proof of the facts are already in the record. Even Mr. Tormey said all his computations were from that basic data.

The Court: And it is scattered all through that record there.

Mr. Crittenden: That is right.

The Court: But it is made up into a final determination.

Mr. Crittenden: That is right and I don't think your Honor is bound by it. On the basic data there is considerable difference between these figures and the figure Mr. Tormey gave. The reason is Mr. Tormey sat down and said so much for a party. I won't allow it. This man says I put in expense for the taxpayer what the taxpayer claimed as gambling losses. [399]

* * * * *

The Court: Let me question the witness again. Mr. Krause, you have made up a tabulation of disbursements, as I understand it, in connection with the operation of the bar?

The Witness: Yes, your Honor.

The Court: And it covers expenditures as you tabulated it from that book over there?

The Witness: From the black book, yes, your Honor.

The Court: And his checks?

The Witness: Yes, your Honor.

The Court: When did you make it?

The Witness: I made this in December of 1947.

The Court: In December of '47?

(Testimony of Clarence L. Krause.)

The Witness: Yes.

The Court: What did you make it for?

The Witness: For the purpose of the second criminal trial, tax trial.

The Court: Did you have anything to do with the preparation of it or work out the final report which was the basis of this determination here?

The Witness: Yes, to the extent that I started the investigation originally.

The Court: Is this a part of it or is it something else?

The Witness: This is not a part of it. This is [401] entirely a separate matter.

The Court: All right, that satisfies me. I don't want the record burdened with it, Mr. Crittenden.

Mr. Crittenden: Your Honor, unless we present the matter that way, then I am going to ask him about it. In the form of brief, I wouldn't hesitate. I will say this, as to his total of expenditures, they are just approximately the columns I ran on in preparation for the first trial, so I can say that his figures that he has here on expenditures and the ones I will submit to you in a brief will be just about the same.

The Court: Did you examine him on this in the first trial?

Mr. Crittenden: No, I just took generalities.

Mr. Marcussen: I think that is not correct. This witness was cross examined in the first criminal trial.

The Court: In criminal proceeding where the

(Testimony of Clarence L. Krause.)

burden is the other way and there has to be proof beyond a reasonable doubt, they sort of spot here and there to show up for the benefit of a jury an error. Here, even though it is small, an error here and there is somewhat different from a showing of the correctness of a determination or the incorrectness of a determination in a civil proceeding such as this.

Mr. Marcussen: That is exactly what was done to the jury in the criminal case. [402]

* * * * *

The Court: Mr. Marcussen, as Counsel for the Government and having made your objection, what is that?

Mr. Marcussen: The page——

The Court: And for the purposes of the record I think I will have you make your statement with reference to what it is and give your basis for your objection and why you are objecting to its being utilized in the record.

Mr. Marcussen: Very well, your Honor. As I understand it, this is a statement of the disbursements made by the taxpayer for the year 1942 and this statement contains a listing of the checks written by the taxpayer for the year 1942 and it also contains a statement of disbursements made by the taxpayer in the form of cash as distinguished from checks and then it contains certain columns. It is a work [407] sheet containing numerous columns extended to the right in which they are set forth here, the columns are headed "wages and bar

(Testimony of Clarence L. Krause.)

taxes, bar expenses, supplies" and then over at the extreme right "personal and miscellaneous" and sub-headings under each one of those, explanation and amount.

Now, Respondent objects to the introduction in evidence or to the use of these documents in this trial for the reason that they represent working papers of Mr. Krause who made an independent audit wholly and completely disconnected from the determination of deficiency in this case. His audit is based—was made, rather, and his distribution of allowable expenses was made for the purpose of presenting a computation of unrecorded income in the second criminal trial. He did not, as I understand it, in the presentation of this audit make the usual Bureau of Internal Revenue audit in which items which were not substantiated as deductions were disallowed. All items concerning which there was any issue at all, all determinations with respect to them were resolved in favor of the taxpayer for the purpose of simplifying the issues, the issue that was presented to the jury in the criminal case in this matter. It is not at all connected with the deficiency case here. It is an entirely separate audit and has nothing to do with the issue here.

The Court: Now, normally in a criminal trial there has to be definite charges to definite items and figures and [408] if the counts in the indictment are not definite and clear, why, then it would be subject to being quashed and thrown out as faulty.

(Testimony of Clarence L. Krause.)

Now, do I understand this then: That for the purposes of this tabulation that what you are saying is that where there was any basis without—I mean clean-cut basis from the showing on the books, without the exercise of judgment, on the basis of unsubstantiated amounts, that only those that were without any need or necessity for that were classified there?

Mr. Marcussen: As disallowed expense.

The Court: As disallowed expense?

Mr. Marcussen: That is right.

The Court: Were those vague and indefinite items in there?

Mr. Marcussen: That is correct.

The Court: Where they would be open to question and open to proof?

Mr. Marcussen: That is correct.

The Court: One way or the other they were, as a general proposition, passed over and allowed to stand as if they were deductions whether they were or not?

Mr. Marcussen: Exactly. All doubtful items for the purposes of the Court——

The Court: Now, just wait a minute until I get through. Now, Mr. Krause, you made up that statement. You [409] made up that tabulation there. You have heard the discussion. It has been over extensive and a lot of repetition here on my part, on Counsel's part and you have heard that statement. Now, you made it up. Do you know the purpose for what it was used? Is that later statement

(Testimony of Clarence L. Krause.)

correct as to what you allowed as expense and what you disallowed for the purposes of that tabulation?

The Witness: Yes, it is, your Honor; the statement is entirely correct.

The Court: In other words, if there was any apparent question where it might have been expense or it might not have been expense, am I to understand that you for the purposes of that audit waived any question and merely entered it as an expense of the business?

The Witness: I leaned over backwards and allowed anything where there was any question about it to the taxpayer, in the taxpayer's favor.

The Court: For instance, what was done with something on the books like an item of entertainment for \$20.00? What was done with that?

The Witness: I would allow it to the taxpayer.

The Court: You would allow it without regard to anything further in the way of a showing as to whether or not it was a personal entertainment or whether business entertainment? [410]

The Witness: Yes, your Honor, I would allow it.

The Court: And that is the way that audit was set up?

The Witness: That is the way it was set up.

The Court: You didn't probe into whether it was personal or business?

The Witness: I did not.

The Court: But you took it from the books where it showed entertainment and you entered it

(Testimony of Clarence L. Krause.)

as a deduction on the theory that it might or might not be business, but you entered it as business?

The Witness: If there was any possible doubt as to where it might be allowable, I would allow just so there would be no question about it in the criminal trial.

The Court: All right, that confirms my judgment. The objection is sustained. [411]

* * * * *

The Court: All right, anything further from the Petitioner?

Mr. Crittenden: No, I don't believe there is any use of going any further.

The Court: Well, of course, if you have some evidence to offer, Mr. Crittenden.

Mr. Crittenden: I understand it is all in there, the basic data and if I brought anybody else in, it would be just a recapitulation of that.

The Court: You would have to be the judge of whether you have any other evidence or not there, Mr. Crittenden; I don't know. All I have done here is to rule that some of the things that you have offered are not competent evidence. Now, I don't know whether there is any evidence or not. You would know better than I would. All I am saying is that if you have [429] anything further to offer, why, I am here to hear it. If not, we will close the case. [430]

* * * * *

[Endorsed]: T.C.U.S. Filed January 3, 1951.

JOINT EXHIBIT No. 8-A

TRANSCRIPT IN CASE No. 30,929-R

* * * * *

PAUL J. TORMEY

Cross Examination—(Resumed)

By Mr. Crittenden:

Q. And that was the second conference, was it?

A. I was present at the conference of December 7 and and the conference of December 29.

Q. That was one of the first cases you worked on when you came with the Intelligence Unit?

A. It was the first case I worked on.

Q. When the other agent left you took this over; this was the first case you worked on by yourself, wasn't it?

A. That is correct.

Q. You had occasion to see the defendant a number of times in addition to those conferences?

A. That is right, although I don't believe I saw her between December 7th and December 29th. It was not until the spring, perhaps later in 1946, that I had any occasion to see her other than at the conference.

Q. You saw her in the spring, did you?

A. As far as I know, yes.

Q. Again in the fall of 1946, did you have occasion to go out to her place of business?

A. I did go out, yes.

Q. You went in the bar and bought some drinks, did you?

A. I recall that I did.

Q. And she gave you some free drinks?

A. She may have.

Q. And that was on Saturday night?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul J. Tormey.)

A. I don't recall what the occasion was.

Q. Do you remember the incident you went in and asked the waitress to bring the defendant over to the booth where you were sitting?

A. Yes.

Q. How many times have you been in there and drunk at the bar? A. Pardon?

Q. How many times have you had drinks at that bar in 1946?

A. Oh, possibly two or three times.

Q. Do you remember the time you went and asked the waitress to bring the defendant over one of the evenings you went in there?

A. No, I have no recollection of talking to anybody except the taxpayer and her sister.

Q. Do you remember the time you talked to her when she came over to the booth and you were in and you suggested that she could run to Mexico and she said that she had not done anything wrong?

A. I had no such conversation with the defendant.

Q. What did you discuss when you went in all these times?

A. I didn't discuss anything with her except to tell her—in response to repeated questions as to what was happening on her case, that it was completely out of my hands, that I had nothing to do but to find the facts, write the report, and any further action was no connection of mine, that I couldn't influence it one way or the other.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul J. Tormey.)

Q. Do you remember about 12:00 o'clock one night when the bar closed and you were still closed?

A. No.

Q. Do you remember any night that you were there very late? A. No.

Q. I will ask you if you did not say to her about closing time at the bar, as you were leaving, "You will thank me from the bottom of your heart for the recommendation I sent to Washington." Do you remember making a statement to that effect?

A. I made no such statement.

Q. Do you remember another time you came in there and had some drinks with her husband, Mr. O'Connor, and she came in later and talked at the bar?

A. I never had a drink with Mr. O'Connor.

Q. Do you remember the time they asked if they could drive you home and they drove you over to your apartment? A. That is correct.

Q. Do you remember that? A. Yes, sir.

Q. You went up and you, the defendant and Mr. O'Connor, her then husband, had a couple of drinks together and she had some Coca Cola? [280]

A. I beg your pardon. Mr. O'Connor refused to take a drink. Said he wasn't drinking.

Q. You brought out some of the pictures while you were an officer in the war?

A. That is correct. Mrs. O'Connor played the piano.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul J. Tormey.)

Q. Do you remember another time you came out to the place with a blonde girl?

A. The only time that I took anybody out there was in reference to securing an apartment for a friend of a friend of mine, and I didn't talk to the taxpayer. I talked to her sister. The sister very kindly showed this party the apartment upstairs. That is the purpose of the visit, and the visit lasted 15 or 20 minutes.

Q. Yes, and that this nice looking blonde was interested in renting the apartment, wasn't she?

A. Yes, very much.

Q. And they quoted \$75 a month rent and you thought that was too much, didn't you?

A. I don't recall any subject matter except I know my friend couldn't take the apartment because the defendant wanted to sell the furniture and she had no resources to pay for it. [281]

* * * * *

Recross Examination

Mr. Crittenden: Q. Mr. Tormey, since yesterday, is your memory any better as to the name and address of this girl that you testified about?

Mr. Campbell: Objected to as an incompetent question. The matter is entirely immaterial and collateral to the issues here.

The Court: Is your memory better what?

Mr. Crittenden: He said he could not remember her name and address and I want to find her identity to subpoena her here as a witness.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul J. Tormey.)

The Court: Read the question, Mr. Reporter.

(Question read.)

The Court: What girl?

Mr. Crittenden: If he has refreshed his recollection since then.

The Court: In relation to what girl?

Mr. Crittenden: The girl he testified about yesterday, and [300] we would like to subpoena her here as a witness. There was a girl he brought up to the defendant's place of business in reference to renting an apartment.

The Court: Q. Do you know anything about her address? A. No, sir, I never did know it.

* * * * * [301]

MRS. ALBERTO BEALL

a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Q. Will you state your name?

A. Mrs. Alberto Beall. [366]

* * * * *

Direct Examination

The Court: Q. Where do you live?

A. I live at 571 Buena Vista.

Mr. Crittenden: Q. Will you please speak louder, so we can all hear you? What is your occupation?

A. Cocktail waitress.

Q. Have you worked for the defendant, Mrs. O'Connor?

A. I have worked there about fifteen months.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Mrs. Alberto Beall.)

Q. Referring to 1946, did you work there part of that time? A. Yes, sir.

Q. Have you ever seen this man over here? I am pointing to Mr. Tormey?

A. Yes, I have. I have waited on him.

Q. Will you tell us where that was and when?

A. Well, I can't set the month, but it was between February and March, I don't know just the dates. I waited on him in Kay's Night Club. He sat in the second booth. He came in and [367] asked for——

Q. What day of the week was it?

A. It was a Friday, Saturday, or Sunday, because I only worked the three days a week, so I don't know what day it was on.

Q. Approximately what time of the day or night was it?

A. Well, I go to work at eight o'clock, and I imagine it was between 9:30 and 10.

Q. What were the circumstances under which you saw him there? What was he doing? Where was he?

A. He went in the second booth and asked if I would call Kay, asked for a drink, first, and asked if I would have Kay come back to the table. I went over to Rose, Kay's sister, the cashier, at the register, and asked her to tell Kay there was a gentleman who wanted to see her.

Q. Did you see the defendant, Mrs. O'Connor,

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Mrs. Alberto Beall.)

and Mr. Tormey sitting in the same booth at any time during that evening?

A. Yes, they sat there all evening.

Q. Did you have occasion to serve them drinks?

A. Yes, I did. I served them drinks.

Q. Who bought the drinks?

A. Well, he bought some of them and she bought some. I never kept count who bought more drinks than the other, because I was busy and never keep count of the drinks, which I don't know.

Q. How late at night did you see him there?

A. He was still there when I went home. That was 12 o'clock, [368] a little bit after twelve, because I turned the lights off at five minutes after twelve, and the three were at the door, Kay, Rose, and myself and the gentleman.

Q. When you left—

A. I left them there. I don't know what happened, or what time he left there.

Q. During the time that you were waiting on them was there anything that drew your attention to them?

A. Well, when I was waiting on the couple in the back booth, right back of them—there is a little steps about like this—I heard Kay, I heard him say, "Well, you can go to Mexico." I was standing there, you know. And she said, she shouted, "Why?"

Well, then, he said, "The Government could bring you back." And I don't know from there on what was said, and she was crying.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Mrs. Alberto Beall.)

Mr. Campbell: May I have that answer read?

The Witness: He said the Government would bring you back.

(Answer read.)

Mr. Crittenden: Q. Was there anything that was said? Was it in a low tone, a loud tone—how clear was it?

A. Well, naturally, they were—maybe they thought they were talking low, but they were not, because the music was on, and you have to talk very loud for people to hear you.

Q. Was there anything else that was said that you heard during [369] the evening?

A. No, I didn't hear anything else. I went on waiting on people. Kay was crying and I went over to Rose and said—

Q. We don't want what you said to Rose. Anything that you said or heard said in your presence with Mr. Tormey. That is all.

Cross Examination

Mr. Campbell: Q. Mrs. Beall, you are still employed by the defendant? A. Yes, sir.

Q. In her place on Valencia Street?

A. Yes, sir.

Q. And you have been employed, I believe you said, fifteen months?

A. Around fifteen months is right.

Q. When did you first go to work for her?

A. It was about 1936—1946, I mean.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Mrs. Alberto Beall.)

Q. When in 1946?

A. Just before Christmas.

Q. That would be November or December, 1946?

A. December.

Q. That was the first time you worked for her?

A. That is right, but I had known her for years.

Q. Yes, but you never worked for her before December, 1946? A. No, I have not.

Q. And you are positive as to that?

A. That is right. [370]

Q. Just as positive as you are of your other testimony? A. That is right.

Q. You claim you heard Mr. Tormey say to her, "You could go to Mexico," is that correct?

A. That is right.

Q. And he shouted it, I take it, in order for you to hear it over the juke box?

A. Oh, no, there was music. She had entertainment, and I was standing just like this, that is, between them. I am in this booth, and she is in this booth. I am right there against them. I couldn't help hearing it. Even if he said it low you could hear it if you were standing where I was. I was waiting on the next table in the next booth, right next to them.

Q. I understood you to say the conversation was quite loud in order that you could hear it over the music.

A. No, I said the music was going and naturally

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Mrs. Alberto Beall.)

maybe they thought they weren't loud, but I heard that. Had to talk loud to hear it.

Q. Then they were talking loud?

A. That is right.

Q. Loud enough so their voices carried beyond their immediate presence to you who were standing behind them waiting on another booth, is that right?

A. The booth seats are like this, and I am right here, right against them almost. You couldn't help but hear them. [371]

Q. You are positive you heard that?

A. I heard that while I was standing that way.

Q. You say that happened in February or March, 1946?

A. That is right. I don't know what date, though.

Q. But you just testified you did not go to work there until December, 1946 and you were very positive of it?

A. It was 1945 I went to work there.

Q. Oh, it was 1945 now. You were as positive of that as you were of the rest of your testimony?

A. Well, I made a mistake in the year, that is all.

Q. When did you first discuss this conversation you overheard with Mrs. O'Connor?

A. I wouldn't have paid any attention to it if she had not been crying.

Q. When did you first talk to her about this conversation you overheard?

A. I haven't talked to her about it.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Mrs. Alberto Beall.)

Q. You never talked to her about it?

A. I just went to Rose and asked her who that gentleman was who was making Kay cry, my sister.

Q. From the time you overheard it until the present time you never talked to Mrs. O'Connor about hearing that conversation? Let the record show the witness shook her head.

A. I did not.

Q. You did not. When did you first talk to her attorneys [372] concerning that conversation?

A. I never talked to her attorneys at all, except right here in the hall today. I have never seen her attorneys. I don't know her attorneys. I never met her attorneys until right out there.

Q. So prior to your taking the stand you never talked to anyone about this conversation?

A. No, I have not. I don't even know her attorneys. I never met them until right out there in the hall.

Mr. Campbell: That is all. [372-A]

* * * * *

ROSE MARIE MATTICK

called by the defendant, sworn.

The Clerk: Will you state your name to the Court and jury?

A. Rose Marie Mattick, M-a-t-t-i-c-k.

Direct Examination ([373])

* * * * *

Mr. Crittenden: Q. Now, I point to this gentle-

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

man over here, Mr. Tormey. Have you ever seen him at the place of business before?

A. Yes, I seen Mr. Tormey several different times.

Q. Referring to any evening, can you give me the approximate date when you have seen him down there at the place of business?

A. Yes, it was in the early part of the year, in March, I think, in February or March.

Q. What year? A. In about 1946.

Q. Where was he in the place of business?

A. Well, he just come in and Miss Beale come up, my back—I am at the register and my back is to the front, and she comes up to me and asks where Kay was. I said she is back here talking, she was at the end of the bar talking to some gentleman. I said, "Why?" She said, "There is a gentleman up here to see her." I said, "O.K., she is down here," so Miss Beale goes back to Kay and she takes her up there and she gave him a booth and talking to Mr. Tormey.

Q. What time did Mr. Tormey spend there talking?

A. Oh, it was after we had closed because he stayed there talking to my sister. He was sitting there talking with Kay all night. [383]

Q. All night? A. All evening.

Q. Until what time?

A. 12:00 o'clock. That was our closing hour then, 12:00 o'clock.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

Q. Were you there when he left?

A. Yes, I was there. I shook hands with him. He told me goodnight with Kay. [384]

* * * * *

Mr. Crittenden: At the time he departed at the bar, what was the conversation?

A. Mr. Tormey was telling us goodnight. He shook hands with my sister and with me. He said, "Kay, don't worry too much about this because I have already given—you are going to thank me some day for making recommendations to Washington. You are going to thank me in your behalf." Now, he said that if I was going to drop dead off this stool, that's exactly what he said.

Q. Did Mrs. Beale come up and report anything to you?

A. Yes. I had my back to the audience——

Mr. Campbell: I object to this, this is something between Mrs. Beale and the witness.

Mr. Crittenden: Q. Did you talk to Mrs. Beale about this matter and bring her up here to talk to me? [384]

A. Oh, no. I never talked to nobody.

Q. I said did you speak to Mrs. Beale and bring her up here to talk to me today?

A. Oh, certainly, to bring her up, certainly I did.

Q. You contacted her last night at my request?

A. Yes, I called her.

Q. You heard Mr. Shannon testify, the bartender?

A. Yes, I did.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Rose Marie Mattick.)

Q. Did you have occasion to talk to him in the last month or so before this trial?

A. Not a month or so. That was before he was called as a witness, I was going up the corner to eat.

Q. Where was that?

A. On Valencia Street, going up to eat at the restaurant. We are at 581, 579 Valencia, and this was, I was going up to the Dairy Lunch to the corner, it happened right on the street, in the middle of the block.

Q. Did he say anything to you about this case?

A. Yes.

Q. And his testimony? A. Yes.

Q. What did he say?

Mr. Campbell: I object to that as immaterial and incompetent and hearsay. [385]

* * * * *

Cross Examination [401] * * * * *

Mr. Campbell: Q. I believe you stated that you talked to Mrs. Beall, who preceded you on the witness stand.

A. Miss Beall.

Q. Miss Beall, yes.

A. Oh, I just called up to tell her to come down here to appear [408] here at court. Is that what you want me to say?

A. No, I don't want you to say anything that is not the truth.

A. Well, I am telling the truth.

Q. I am asking you if you called her up last night and asked her to come down here?

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

A. Yes.

Q. And help your sister—or to appear as a witness. That “help your sister” may go out.

A. That’s right, yes.

Q. When did you talk to Miss Beall, at any time prior to last night as to what her testimony would be?

A. No.

Q. You never had?

A. I never talked to Miss Beall about testimony or anything.

Q. Did Miss Beall ever tell you about the conversation she had overheard?

A. You mean with Mr. Tormey?

Q. Yes.

A. The night that it happened she came up, Kay was crying——

Q. Did she tell you about it that night?

A. She came and asked me who was the man. I said, “Who?” And I turned and I said, oh, he was Mr. Tormey. She said, “Well, what is she crying about?”

Q. I asked you if Miss Beall at any time prior to last night related anything to you about overhearing Mr. Tormey say, [409-10] “You can go to Mexico”?

A. Yes, she told me that before.

Q. She told you that before?

A. Yes, she told me that before, but I didn’t pay no attention to it, because, after all, you know,

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

she just came up and told me, she said she heard a conversation, and Kay was crying. She said Kay said, "Why should I go to Mexico, I haven't done anything."

Q. When did she tell you that?

A. She told me that right after it happened; maybe a day or so after it happened.

Q. Did you report that back to Mrs. O'Connor?

A. Yes, sure, I did, and that wasn't it, I heard Mr. Tormey say——

Q. No, no, please, Mrs. Mattick; just answer my questions.

A. I am sorry I can't answer. [411]

* * * *

Redirect Examination

Mr. Crittenden: Q. Will you testify as to what happened that afternoon, and who was present?

A. I was upstairs alone in the apartment, I was cleaning the apartment, putting up new——

The Court: When was this?

A. It was in February sometime, your Honor; I could not say the date.

The Court: What year?

A. It was in 1946. [418]

The Court: What month?

A. It was after the 15th of February, because the people's rent was up then. They had moved and I was cleaning up the apartment. It was between the middle of February and the 1st of March.

The Court: Q. Who was present?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Rose Marie Mattick.)

A. Just me. I was up there, and I was just cleaning the apartment, and my sister has a loud speaker from the tavern upstairs. She called me and says Mr. Tormey is coming up to look at the apartment with his lady friend. I said, "All right." So they came on up. Then Kay comes up, too.

Mr. Crittenden: Q. What was said in the presence of all four of the people at that particular time? Can you state who said what, and the approximate order in which it was said?

A. Well, I showed the apartment to the little lady that was with Mr. Tormey that was looking for the apartment, and she wanted something more secluded; what I mean by that is, the living and bedroom is together, and she wanted the privacy of a bedroom. She said that was the reason she did not want that apartment, but she wanted an extra bedroom in there.

Q. Was there anything Mr. Tormey said?

A. I can't remember that.

Q. Was there any discussion of the rent with her?

A. Yes. It was \$65 a month. Yes—I will take that back. Mr. Tormey said he thought that was pretty high, the rent. [419]

Q. Do you remember who this fourth person was that you were talking to, was she introduced?

A. Yes, yes, Mr. Tormey introduced her to me, but I don't remember her name. She was another tenant just looking for an apartment with him.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

Q. What did she look like?

A. She was a very beautiful woman, she was a very beautiful person.

Q. How old?

A. Very nicely dressed, and she was light-complected, and a very nice person, she really was.

Q. About how old was she?

A. Well, I imagine she was in her thirties. I wouldn't know, but just kind of judging.

* * * * *

Recross Examination

Mr. Campbell: Q. Did she tell you her husband was outside in the car waiting for them while she inspected that apartment? A. No.

Q. She did not tell you that? A. No.

Q. Did you look out the window, or did you have occasion to go downstairs at any time while she was there, or at the time she left? [420]

A. No, I didn't go out there. I just went to the steps, and out on the apartment steps, while they were going downstairs, and talking on the way down, and they didn't go out to the car, they went on back down to the tavern.

Q. Didn't Mr. Tormey tell you on that occasion that it was a friend of a friend or a friend of his family who were the persons who needed an apartment? A. He didn't tell me that.

Q. Did he say it was a friend of a friend?

A. No, he didn't tell that to me. He didn't tell me anything about the lady. He just introduced me

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Rose Marie Mattick.)

to the lady. I don't know what he told my sister, but he didn't tell me anything.

Q. You don't know what he told your sister?

A. I don't know anything about that.

Mr. Campbell: That is all. [420-A]

* * * * *

CATHERINE O'CONNOR

resumed the stand, having been previously duly sworn, testified as follows: [483]

* * * * *

Direct Examination

Mr. Crittenden: Q. Did Mr. Tormey come down to your place of business at any time during this investigation? A. Yes, he did. [577]

Q. What were the days?

A. He was down there one afternoon. He was sitting there drinking with Ed O'Connor all afternoon.

Q. Let us have the time, place and persons present. A. It was in the fall of 1945.

Q. Was it before or after the first time that you made a statement in the Intelligence Unit's office?

A. It was afterwards because otherwise I wouldn't have known Mr. Tormey.

Q. Was it after the last conference down there about which testimony has been given or was it before or during the last time?

A. I can't remember exactly. I think it was in between.

Q. Who was present at that time?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Catherine O'Connor.)

A. Well, there were the regular customers present and my husband, Ed O'Connor—I was married to him at the time—he was there and my sister is always there and myself and my bartender.

Q. What was said?

A. I don't know what was said. I was busy myself. Mr. Tormey and Mr. O'Connor were talking, and when Mr. Tormey got ready to go home, we offered to take him home in our car, and we did.

Q. Where did you go?

A. He invited us up to his apartment and he served us a drink, and he was very pleasant. I played the piano in his apartment. He had taken pictures, and his various trophies or whatever it [578] was he got in the war he showed us. And we had a very pleasant time while we were there. I think we were there about an hour with him.

Q. Anything else said or done?

A. Not at his place, no. Just that. He was alone. He said his wife wasn't there.

Q. Referring to the next time you saw him, where did you see him then?

A. And then Mr. Tormey came in one night.

Q. What was the approximate date of that?

A. And how I am trying to determine when Mr. Tormey came in was this way: I had some people up in the apartment, in the back apartment.

The Court: Fix the time.

The Witness: Yes, Judge. I was trying to. I

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Catherine O'Connor.)

think it was in the spring. It was in the latter part of February or the first part of March of 1946.

Mr. Crittenden: Q. What time of day was it?

A. And he came in—It was at night, and it was after the entertainment had started. My entertainment starts at 9:00 o'clock.

Q. Who was present when you talked to him?

A. I was sitting at the bar talking to a salesman at the time when he came in. I didn't even see him come in, and I was down at the end of the bar, and my little waitness came down and [579] either she——

Mr. Campbell: I am going to object to the conversation other than the conversation to which attention was originally directed.

Mr. Crittenden: Q. When you first had your attention drawn to him, where were you?

A. I was at the bar and I was notified—I will put it that way—that Mr. Tormey wanted to talk to me.

Q. Then what did you do?

A. And then I went up in the booth with him.

Q. What happened up there? What was said?

A. He was sitting there. He had a Scotch and soda. He was drinking. We got to talking. He was drinking. He had been drinking before he came in.

Mr. Campbell: I ask that be stricken out as a conclusion of the witness.

The Court: Let it go out. Let the jury disregard it.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Catherine O'Connor.)

Mr. Crittenden: Q. What, if anything, was said?

A. The reason I say that about it was because——

The Court: The question is, state what was said at that time and place between you and Tormey.

The Witness: Judge, I was going to tell him he just mumbled.

The Court: Tell the jury the conversation.

The Witness: He was mumbling about this trial to me. I [580] couldn't get head or tails what he was mumbling. He was telling me, well, about these penalties of not turning in a proper income tax report and this and that about it. He was talking in general about me being in this trouble. And he said, "Of course, you could go to Mexico."

And I said—and that is when I called out and said—but he said, "We will bring you back." He knows he said it, too.

Mr. Campbell: I ask that the last be stricken.

Mr. Crittenden: Q. Just give the conversation and what took place.

A. That is what I have said, and I called out and said, "I have no reason to go to Mexico because I have done nothing wilful."

* * * * *

Mr. Crittenden: Q. How long did he stay there?

A. He stayed there until 12:00 o'clock, until the place was closed. [581]

Q. Then what happened?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Catherine O'Connor.)

A. He was the last to go. There was no one left there but my sister and myself and this girl, Alberta, who works there, and she left, and Mr. Tormey was still at the door with us. So we shook hands and I was feeling badly, of course.

Q. Did he make any statement to you?

A. He said there would be a day I would thank him for his recommendation to Washington.

Q. Is that when he left after that?

A. And while he was there he asked me about an apartment.

The Court: Proceed, counsel.

Mr. Crittenden: Q. Can you tell me what was said about an apartment?

A. Yes, he asked me if I had an apartment and I told him it just happened that I had an apartment to rent. These people just got out of there. So he had a friend who was looking for an apartment.

Q. When did he bring anybody around to look at the apartment?

A. He told me he would call up and find out about more definite, and I said, "All right," and so he called——

Q. When was that?

A. He called three or four days later.

Q. Did he make an appointment?

A. He said he was bringing up a friend, and he did. He brought up a young lady, a very nice young lady. [582]

Q. Did you show her the apartment?

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Catherine O'Connor.)

A. No, I did not. I was on the bar.

Q. Did you go upstairs during all the time it was being shown?

A. Yes, I ran upstairs for a few minutes. My sister was up there cleaning. I called up and told her Mr. Tormey was coming up. And then I went up there and I talked prices with him. I talked rentals. And he said he thought the amount was too high for the place.

Q. How much did you quote for it?

A. I think I asked him \$65 or \$75, I am not sure, but it was just the amount I had been getting for the apartment when the people left, the amount that I am allowed.

Q. Was anything said about any of the facilities as to whether it was acceptable or not?

A. And the little lady said she wanted more privacy. The glass doors in the bedroom, the doors in the bedroom coming into the livingroom were glass, and she wanted more privacy.

Q. When they left the apartment, did you go with Mr. Tormey and this girl?

A. No, I did not. I ran downstairs.

Q. Did you see them leave?

A. Because I was alone on the bar. And they came in—I think, yes, I am sure they did. They came in afterwards. Now, whether they had a drink or not I don't know. But they came up in a Yellow Cab. The reason I know they came up in a Yellow Cab was [583] because they were standing at the

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Catherine O'Connor.)

—I was standing in front of the bar when they drove up.

Q. Did you see them leave?

A. I seen the Yellow Cab drive right up to the front of the door, and I didn't see Mr. Tormey and this girl get out of the cab, but the cab stopped in front of my door and the next thing I seen Mr. Tormey and this young lady were coming through the door.

Q. Did you see them leave?

A. Yes, I saw them leave, but I didn't see them get in a car or a cab. I saw them walk out the door, turn, and go down 16th Street. [584]

* * * * *

PAUL W. TORMEY

called in rebuttal, previously sworn.

Direct Examination

Mr. Campbell: Q. You have previously been sworn in this case? A. Yes.

Q. Mr. Tormey, did you at any time during the course of this investigation or afterward ever have any conversation with this defendant wherein you stated in words or in effect that she could "go to Mexico, we can bring you back."? A. No.

Q. Or that you can't bring her back?

A. No.

Q. Did you ever state to her at any time during the course of the investigation or after that she could go anywhere?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

A. Not that I recall, sir.

Q. While not material to the case, there has been made certain statements here relative to your trip to the apartment or apartments of the defendant with a person characterized as a beautiful blonde for the purpose of renting an apartment. For the purpose of the record, I want you to state the circumstances [655] exactly as they occurred.

A. Yes. First of all, there has been considerable confusion as to the date.

Q. No. Just state when it occurred and what occurred and the circumstances under which you went there.

A. It was subsequent to July 1946. It may have been in the late fall of 1946 or early spring of 1947, January or February 1947. I don't recall whether this girl was a beautiful blonde or not. I would like to, but I don't remember. She was introduced to me by a friend of mine whose name I can divulge if necessary, and as a favor to my friend, I took this young lady and her husband in my own car, not a taxi, out to this tavern.

Q. How did you happen to go to the defendant's place?

A. Because I had been talking to the defendant, knew she had these apartments and thought one might be available to rent. In fact, I think I verified it on the telephone before I went down there. I believe it was testified to that effect, and I arranged the meeting and we came down to talk to

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

her in the bar for a short time and went upstairs. I had no concern with whether the apartment was rented or not except the rent seemed high to me and I said to my friend when the taxpayer's sister, Mrs. Mattick, as she testified, said the furniture would have to be purchased along with the apartment, I advised my friend, "Well, don't bother about it, I didn't know anything that the [656] furniture had to be purchased here." I went home and told my wife about it, thinking whether she would be responsible or not to report the matter for demanding to purchase the furniture, that was considered unethical then.

Q. Was anything said at that time, at the time the parties were having the interview, about privacy of the bedroom?

A. Not that I recall. I did not pay any attention to it. As a matter of fact, I was in the other room when Mrs. Mattick and the young lady were all around there.

Q. Did the young lady's husband go upstairs with you?

A. No. He had an appointment downtown. I believe he came in to the bar with us, then left, or he stayed in the bar and left immediately after.

Q. How did you, her husband and yourself arrive there on that occasion?

A. In my own personal car.

Q. Had you ever seen either her or her husband prior to that day? A. No.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

Q. Have you ever seen them subsequently to that date? A. No.

Q. You were simply doing a favor for a friend?

A. That is correct.

Q. Was that at his request?

A. That is correct. [657]

* * * * *

Cross Examination [662]

* * * * *

Mr. Crittenden: Q. Mr. Tormey, at the time you went to the bar of an evening, do you remember whether that was a weekend?

A. It probably was on a Friday or Saturday night. That was the only time I ever recall being there.

Q. That was when she told you she expected a vacancy in the apartment?

A. I don't recall she told me that. In fact, I think the apartment deal had happened several months before the incident that you mention, so I—To answer your question, I can't recall that that was discussed at that meeting.

Q. The apartment deal, do you remember the day of the week that was?

A. No, I have no idea.

Q. It was a weekday?

A. I have no idea.

Q. Do you remember the time of day it was?

A. Yes; about 4:00 o'clock in the afternoon.

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

Q. You were employed full time in the Intelligence Unit?

A. Yes. I happened to be on leave that day, though.

Q. Then you could give us the exact date. You know the days you are on leave. [664]

A. No; that has nothing—

Q. You must know when you take a leave.

A. I am not testifying as to my leave.

Q. Do you keep records of when you take leaves? A. That is correct.

Q. Could you tell me from that the day you were there at the apartment?

A. No, not from that.

Q. You showed a lot of concern about the rent for that apartment, didn't you?

A. Not that I recall. It seemed high to me.

Q. \$65 to \$75 a month?

A. I don't recall.

Q. You didn't tell the woman to go to the OPA, did you?

A. No. This is an entirely different apartment. This building is not the same building. The taxpayer had moved in 1945, she testified, so I had no notice of any of her concerns in this new place.

Q. Did you leave the husband sitting in your car downstairs?

A. I have testified to that. As far as I recall he was either in the car or waiting downstairs in the bar for us.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

Q. Did he intend to live in the apartment?

A. I know nothing of their personal plans. I had never met the couple before and have never seen them since.

Q. Did he give any reason why he did not want to come up and look at the apartment?

A. It was of no concern of mine.

Q. When you left you went downstairs to the bar, didn't you?

A. Not that I recall. We may have, but not for a long time. It couldn't have been very long, because the young man who was with us had an appointment downtown. As I recall, we drove him up to Market Street. He got out and took a taxi from there.

Q. In reference to this place, where did you park? Right in front of it?

A. I don't recall, probably not, because it is almost impossible to park on Valencia Street at four o'clock in the afternoon.

Q. Do you have any recollection at all of where you parked the car?

A. No, I have not. It was close by, across the street, probably.

Q. As soon as you left there you came down and he took a taxicab from Market Street, is that right?

A. That is the way I recollect it, yes.

Q. You did not take a taxi out there? [666]

A. No, sir.

Q. Did you go through the apartment, yourself?

Joint-Exhibit No. 8-A—(Continued)

(Testimony of Paul W. Tormey.)

A. I went up—as I recall it was upstairs—went into kind of a big hall, and there appeared to be a living room, and then open glass doors, and a place with a bed in it, so you could see the whole apartment once you were in it.

Q. Then you did hear what the parties were talking about?

A. Very probably I did, but I don't pay attention to a couple of women discussing apartment houses.

Q. Now, the night that you say you were there, was it 9 to 12 that you were at the bar?

A. I have not said how long I was there.

Q. How long were you there?

A. I don't know. It was not a matter of importance to me how long I was there.

Q. Do you have any recollection of how long you were there?

A. Why, I presume I may have been there two hours.

Q. Do you remember closing time?

A. No. I question I was there closing time, but I know I was anxious to get away, because the taxpayer was crying and asking me what was going to happen in this case. The report on the case had been written, signed, and sent in months ago, so consequently out of my mind, and I wanted to get away from there, and so far as I was concerned I had no desire to stay there. [667]

Q. Why did you go to the bar?

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

A. Because we were still interested in this taxpayer. He had bought this new bar out of funds, and we had not made up our minds whether we were going to investigate any further. Part of our work is investigation of that sort.

Q. Is it your testimony you had sent a report in and had finished your investigation?

A. That is right, for the years under review. That does not end the matter.

Q. You were going over to see if you were going to make a further investigation of that?

A. No, I was interested, I said, to find out what I could find out.

Q. And also to see if you could have some free drinks?

A. Oh, I do not believe so. I think the defendant will testify if I accepted one or two free drinks from her that would be the extent of it, and I always had to refuse them, and out of politeness I finally did. I did not have to accept free drinks.

Mr. Crittenden: That is all.

* * * * *

Redirect Examination

Mr. Campbell: Q. When was your report in this case completed, Mr. Tormey?

A. May of 1946. [668]

Q. And you are positive that these two occasions which you have been questioned about were after that date? A. Yes, sir.

Joint-Exhibit No. 8-A—(Continued)
(Testimony of Paul W. Tormey.)

Mr. Campbell: That is all. [669]

* * * * *

[Endorsed]: Filed November 13, 1950.

PETITIONER'S EXHIBIT No. 1

Technical Staff, 4 April 1950
Bureau of Internal Revenue, Treasury Dept.
508 Sharon Bldg., San Francisco 5, Calif.

Re: Catherine O'Connor vs. Comm'r. U. S. Tax
Court No. 24206.

Dear Sirs:

Yesterday, when I telephoned Mr. Sorrell of your office to discuss possible compromise of the above litigation, I learned that Mrs. O'Connor had been enticed into a conference without my knowledge or consent. I then telephoned Mrs. O'Connor and learned of the details, and was assured that I had been her attorney, and was still her attorney and she wanted me to continue representing her. I also telephoned a McLaughlin who was present and who told me about what had transpired.

I have attended a couple of conferences with the Technical Staff and General Counsel's office looking toward a possible compromise of the above litigation, and on March 9, 1950 I had written the Technical staff a letter outlining a basis for possible settlement.

Now, I learn that some day last week, a certain McLaughlin contacted your office and made an appointment to bring in Mrs. O'Connor, my client. By letter dated March 30, 1950 (evidently after this request for a conference) my suggestions as to a possible basis of a compromise were rejected by a letter which arrived yesterday afternoon. I immediately called Mr. Sorrell to see if there were some basis that the government could suggest for a compromise, and then I learned Mrs. O'Connor had spent the morning in your office discussing the pending litigation; and when I asked what was said, I was told I would have to ask my client; and when asked who were present, I was told Mr. Marcusson (of the General Counsel's office to whom this litigation was assigned to defend the Commissioner), Mr. Tormey (Special Agent, Intelligence Unit who was the principal investigator who instituted and prepared the original report recommending criminal prosecution of my client), Mr. Sorrell, and Mr. Lawder.

My client told me by telephone that McLaughlin had suggested the idea, arranged the meeting, and was present. Mr. McLaughlin told me by telephone that he was neither licensed to practice before the Treasury nor before the U. S. Tax Court.

My secretary tells me that no attempt was made by either the Technical Staff nor by the General Counsel's office to advise me of the contemplated conference.

The A. B. A. Canons of Professional Ethics states: "Negotiations with Opposite Party. A

lawyer should in no way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

My client tells me that those of your office and the General Counsel's office who were present undertook to advise her on matters of law in the pending case, burden of proof, presumptions, etc., in that litigation with the Commissioner.

Very frankly, I was horrified to learn of what transpired. I attempt to follow the canons of legal ethics, and I have always believed that the Commissioner expected those under him to abide by the rules of ethics. Certainly, one does not shed his ethics when he undertakes employment in the Bureau of Internal Revenue.

It is indeed shocking when one considers the following:

(1) McLaughlin is not licensed at all to appear and has no right or privilege to appear in any matters before the Treasury Dept. and has no right to practice before the U. S. Tax Court.

(2) No effort was made to notify me of the conference, although I have a telephone and office but a block and a half from the Technical Staff; have appeared in the matter, and appear as the sole attorney of record for the Petitioner Mrs. O'Connor.

(3) There is a lot of bad blood, known to all parties involved, which arose in the District Court trial involving Mrs. O'Connor when I cross-examined Mr. Tormey and he admitted during the investigation he brought a blond girl, not his wife, to Mrs. O'Connor to obtain an apartment for this girl from Mrs. O'Connor.

(4) Mr. Hyman, associate counsel with me in the defense of Mrs. O'Connor before the District Court, believes as I do that McLaughlin was and is working for and with the Intelligence Unit to embroil Mrs. O'Connor and we base this upon McLaughlin's suggestion to Mr. Hyman that we permit him to influence District Judge Roche in chambers while the case was pending before him; and Mr. Hyman specifically warned McLaughlin not to and threatened proper proceedings if he should attempt such a thing.

The cause of Catherine O'Connor vs. Commissioner of Internal Revenue is a controversy, at issue, before a judicial tribunal, the U. S. Tax Court, in which Mrs. O'Connor is a party litigant and I am her counsel and the Commissioner is a party and represented by the Technical Staff and the General Counsel's office. This is not a matter being appealed from the Agent's Office.

May I have an acknowledgment of this letter by return mail, and a prompt reply as to what took place and what the Technical Staff's and General Counsel's office position is on this matter.

I feel very deeply that a grave injustice has re-

sulted from the unfortunate incident that took place yesterday.

Very truly yours,

HOWARD B. CRITTENDEN, JR.

HBC:S

RESPONDENT'S EXHIBIT N

[Petitioner's Exhibit No. 2 admitted for identification Nov. 13, 1950; Respondent's Exhibit N admitted in evidence Nov. 14, 1950.]

[Letterhead of Treasury Department]

CC:A:PD SF:BHN-LAM

April 10, 1950

Mr. Howard B. Crittenden, Jr., Attorney at Law,
Central Tower Bldg., San Francisco 3, Calif.

In re: Catherine O'Connor, Docket No. 24206.

Dear Mr. Crittenden:

This will acknowledge receipt of your letter of April 4, 1950, addressed to the Technical Staff, with which was enclosed a copy of a new power of attorney executed on the same day, authorizing you to represent Mrs. Catherine O'Connor in her case before The Tax Court of the United States. The letter has been referred to me for answer.

Please be advised that on April 3, 1950, Mrs. O'Connor appeared in the office of the Technical Staff accompanied by Mr. Raymond K. McLaughlin and requested that she be permitted to discuss her case with a view to reaching a basis for settlement without litigation.

Mrs. O'Connor stated that she did not want you to

represent her any further in this case and that she was requesting you to withdraw. She then asked that Mr. McLaughlin be allowed to represent her in the conference and executed a power of attorney in the presence of the conferees in favor of Mr. McLaughlin, revoking all other powers of attorney, and expressly giving him "full power of substitution and revocation." In view of the fact that Mr. McLaughlin was not enrolled to practice before the Treasury Department, her request to be represented by him at the conference was denied. At her request, however, he was permitted to remain in the conference room.

Under the circumstances the Staff representative acted properly in declining to discuss with you on the telephone what happened at that conference, when you called later the same day. Moreover, in view of the new power of attorney executed by Mrs. O'Connor in your favor there appears to be no necessity for answering your inquiry as to what occurred at that conference.

It is regretted that you have seen fit to make unfounded charges of impropriety concerning the procedure followed in handling Mrs. O'Connor's case in this office. You are referred to Conference and Practice Requirements, Bureau of Internal Revenue, as revised February 1942, which are published in full in the tax services.

Very truly yours,

/s/ B. H. NEBLETT,
Division Counsel

PETITIONER'S EXHIBIT No. 3

Technical Staff 11 April 1950
Bureau of Internal Revenue, Treasury Dept.
Sharon Bldg., San Francisco, Calif.

In re: Catherine O'Connor vs. Comm'r U. S.
Tax Court No. 24206.

Dear Sirs:

This morning's mail carried the letter of the General Counsel's Office of April 10th in the above matter.

Mrs. O'Connor tells me that when she first appeared at the Technical Staff Office, she stated that I represented her and she wanted me to represent her in the matter before the United States Tax Court; and when asked if I knew about her presence at the office of that agency, she said I did not. This is quite different from the statement of fact contained in the letter of the General Counsel's office of the 10th.

Even if we assume that the statement of fact by the General Counsel's office be correct, still it would not justify the conduct of District Counsel who sat in the conference nor the conduct of the others in the Technical Staff:

(1) The general rule (which includes the Federal Rule) is stated in the Rules of the United States Tax Court, Rule 24b): "Withdrawal of counsel. Counsel of record in any proceeding desiring to withdraw, or any petitioner desiring to withdraw counsel of record, must file a motion with the Court

requesting leave therefor reciting that notice thereof has been given to the client or to the counsel being withdrawn, as the case may be. The Court may, in its discretion, deny such motion."

I remain counsel in a case in which I have appeared by the filing of the Petition, until the Court's order withdraws me, or the relationship of attorney-client is revoked by death, etc., or the termination of the litigation. Adverse counsel and the Court are bound by this rule and must deal with me as counsel until the order of the Court relieves me as counsel.

(2) The Rules of the Bureau of Internal Revenue (Practice & Procedure), Rule IV, Power of attorney not required in certain cases pending before the Tax Court, provides: "In a docketed petition before the Court, it is considered that the petitioner and the Commissioner stand in the position of parties litigant before a quasi judicial body. The Tax Court has its own rules of practice and procedure, and its own rules respecting admission to practice before it. A Staff division in the decentralized areas is authorized to deal with the counsel of record before the Court in a petition docketed by the Court. Therefore, correspondence in connection with Court dockets will, ordinarily, be addressed to counsel of record before the Court; and in any event the position of the Bureau is that such counsel of record shall receive copies of any correspondence, or be advised as to the general nature of any communications, which for good and sufficient reason may be addressed directly to the taxpayer."

(3) U. S. Tax Court Rule 2, provides: “* * * Practitioners before this Court shall carry on their practice in accordance with the letter and spirit of the canons of professional ethics as adopted by the American Bar Association.”

Attention is drawn to American Bar Association Canon of Professional Ethics Number 9, quoted in my letter of April 4, 1950.

On April 5, 1950, I telephoned Mr. Lawder, head of the San Francisco office, and told him that I felt I had been very badly treated and kicked around, and that I wanted an opportunity to sit down and present my side in the matter and suggested that Mr. Marcusson, Mr. Sorrell, and any other person interested should be present. He stated he had read my letter of the 4th, that he was then engaged in a conference but would telephone me as to the time for the requested conference.

The fact that District Counsel and the Technical Staff would accept and file “a power of attorney” from McLaughlin, an unlicensed person, and permit him to remain at the conference shows that the statement that he was denied the right to represent Mrs. O'Connor at the conference is an attempt to shade the word “represent”. The fact remains I was attorney of record in the litigation before the U. S. Tax Court, and must remain such until the Court makes an order relieving me upon proper notice and a motion, and no “power of attorney” to McLaughlin nor revocation could have any legal effect until the Tax Court rules and the rule of law of Federal Court Practice were met.

Mr. Lawder was at neither of the prior conferences that I attended on behalf of Mrs. O'Connor. He was at the conference at issue. If he were a necessary or proper person at the conference, it appears a bit unusual that he would not attend one where the taxpayer is represented by licensed counsel, but would attend when an unlicensed person were present and licensed counsel absent. If he were neither a necessary nor a proper person at the conference attended by licensed counsel, it might raise the inference he was brought into the conference at issue to share responsibility.

I do not know what was said during the two (2) hours my client was in conference in my absence; and my client is not skilled nor does she have knowledge of tax procedure. I am writing you again asking what was said during the conference; and if you have a transcript of it or any part of it, to provide me with a copy of the transcript.

My client obtained the impression from what was said to her during the conference I did not attend, that the officials of the Staff and District Counsel's office did not want to confer with me, and other matters which attacked me professionally. I feel that driving a wedge between attorney and client is not at all the proper subject of a conference, particularly in the absence of the counsel. Furthermore, she appears to have been advised on matters of law during the conference, which I also feel a bit improper. It is most essential that I be advised by letter as to what transpired, to properly represent my client in this matter.

There must have been a lot said about the merits of the cause at issue, on both sides during the conference I did not attend, and it is most essential that I be fully informed of your contention as to any and all admissions or any positions taken by my client in my absence.

For my own part, I feel a great injustice has been done me, and I would like to have this matter a subject of a conference. I am still awaiting Mr. Lawder's advice as to the agreeable time for this meeting.

The Bureau of Internal Revenue Rules of Practice and Procedure entitle me to be advised of any communication made directly to my client. I think I am entitled to this information from your office.

My authorization to represent Mrs. O'Connor exists under and by virtue of my relationship of attorney and client before the United States Tax Court. The instrument I sent you dated the 4th, signed by both my client and myself was a mere statement that the relationship of attorney and client had existed from the inception of the U. S. Tax Court litigation, did still exist, and continued to exist, to dispell any doubt of my authority as counsel that might arise from the very unfortunate incident of Monday, April 3rd, and the unfair advantage taken of my client.

Very truly yours,

HOWARD B. CRITTENDEN, JR.

HBC:S

[Endorsed]: No. 14392. United States Court of Appeals for the Ninth Circuit. Catherine O'Connor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 14, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14392

CATHERINE O'CONNOR, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

The petitioner Catherine O'Connor, herewith states, pursuant to Rule 75(b), the points on which she intends to rely upon the petition for review in the above-entitled matter:

1. That the above-entitled Court failed to make findings of fact upon the issues of the amount of expenses and deductions for each of the years 1942, 1943 and 1944; failed to make findings on the issue and motion for exclusion of evidence obtained by

unlawful methods, and of evidence obtained as leads therefrom; and failed to make findings on the issues that the accounts and deficiencies of the Commissioner were based upon the accounting, work and investigation of Special Agent Tormey, and that he was motivated by improper motives, and the issues of his solicitations of considerations for himself and a blonde girl friend during the investigations he made.

2. That the above-entitled Court erred in failing to exclude participation of counsel for the respondent who obtained information unlawfully, in violation of the Rules of Court, United States Tax Court, and in violation of the American Bar Association Canon, through enticing the petitioner, in the absence of her counsel, and without knowledge or consent by counsel, into a conference represented by an unlicensed person, at which conference the merits of the case were discussed.

3. That the above-entitled Court erred in refusing to permit petitioner upon the trial to prove amounts of expenses and deductions in each of the years involved, by the witness Krause.

4. That the above-entitled Court erred in refusing to permit the petitioner to prove by an accountant the expenses and deductions for each of the years involved, upon the grounds that the primary records thereof were already in evidence, and then found that there was not sufficient evidence by such primary records and testimony to make a finding of the account or amount of expenses and deductions.

5. That the above-entitled Court erred in denying petitioner the right to prove the expenses and deductions of said taxpayer in each of the years involved, to wit, 1942, 1943 and 1944, an issue in the above-entitled action, and thereby denied petitioner due process of law, Fifth Amendment, United States Constitution.

Dated: June 24, 1954.

/s/ HOWARD B. CRITTENDEN, JR.,
Attorney for Petitioner, Catherine
O'Connor

[Endorsed]: Filed June 25, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

Excerpt from proceedings of Monday, November
22, 1954.

Before: Healy, Orr and Pope, Circuit Judges.

ORDER GRANTING MOTION

The motion of respondent for permission to furnish photostatic copies of certain exhibits in lieu of printing exhibits coming on for hearing, there being no one present on behalf of respondent, Ordered motion submitted for respondent on papers filed, and argued by Mr. Howard Crittenden, counsel for petitioner in opposition thereto, and submitted to the court for consideration and decision.

On consideration thereof, Further Ordered said motion granted.